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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE ET AL., Appellants,

VS.

STATE TAX COMMISSION ET AL.,

STATEMENT OF JURISDICTION.

WILLIAM H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellant.

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STATEMENT OF JURISDICTION.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Appellants submit, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, the following statement of the basis of this Court's jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of Mississippi.

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, being Section 344, Judicial Code, U. S. Code, Ann. Title 28.

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The decree of the Supreme Court of the State of Mississippi, affirming the judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, appealed from, was entered November 9, 1931, R. 28.* 137 So. 9503.

The petition for appeal was presented and allowed on the 8th day of December, 1931. R. 43-51.

C.

NATURE OF THE CASE AND RULING BELOW

Chapter 124, extraordinary session, Mississippi legislature, 1928, being Section 5027, Mississippi 1930 Code, contains the following language:

> "5027. Imposition of the tax. There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1930 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: On the first $2000.00 or taxable income, or any part thereof, at the rate of two and one-half per centum; on the next $3000.00 of taxable income, or any part thereof, at the rate of three and one-

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State and on file with the Clerk of the Court. The record has not yet been printed.

half per centum; on the next $10,000.00, or any part thereof, at the rate of four and one-half per centum; on all taxable income in excess of $15,000.00, at the rate of five and one-half per centum."

The entire chapter will be found in Appendix I hereto.

Paragraph (a), Section 5033, Mississippi 1930 Code, being Chapter 32, extraordinary session, Mississippi legislature 1928, contains the following language:

"55033. Gross income defined.—For the purposes, except as otherwise provided for non-residents, the term gross income:

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit, or gains or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received."

Subdivision (11) of Paragraph (b) of said Section 5033 contains the following language:

> "(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising."

The entire section will be found as part of Appendix I to this statement.

S. B. Lawrence, a citizen and resident of Jackson, in the First Judicial District of Hinds County, Mississippi, in the year 1929, as well as in prior and subsequent years, was engaged in the construction of roads, bridges and highways in the states of Mississippi, Alabama, Louisiana and Tennessee. He made such a profit wholly in the State of Tennessee as that if liable for income tax to the State of Mississippi thereupon, he was indebted to the State of Mississippi for approximately $2250.00. Not having included in his gross income for the year 1929, income earned in the State of Tennessee in the construction of highways therein, the Tax Commissioner of the State of Mississippi, under Section 5050, Mississippi 1930 Code, which section will be found in the appendix hereto, made an assessment against him therefor.

Under Section 5056, Mississippi 1930 Code, which section will be found in the appendix, he applied to the Tax Commissioner for a revision of the tax assessed against him. The Tax Commissioner, however, confirmed the assessment against the appellant. Whereupon, under Section 5057, Mississippi 1930 Code, which will be found in the appendix hereto, he applied to the Mississippi State Tax Commission

for a rehearing, R. 2, wherein he specifically set up that the act in question would violate the Fourteenth Amendment to the Constitution of the United States if susceptible to the construction that the appellant was subject to an income tax on earnings contracted for and earned in carrying on an occupation exclusively beyond the limits of the State of Mississippi. R. 4-5. The action of the Tax Commissioner was affirmed by the Tax Commission. Whereupon, under Section 5057, Mississippi 1930 Code, S. B. Lawrence filed a petition in the Chancery Court of the First Judicial District of Hinds County, Mississippi, requesting a hearing of the case on its merits, accompanied by a bond, approved by the clerk of the court, in a sum double the amount of the controversy, conditioned to pay the judgment of the court.

The petition, R. 1, alleged that in the year 1929, he went into the State of Tennessee entered into certain contracts for the construction of roads therein, wholly within the State of Tennessee; that no part of the contracts was entered into or performed in the State of Mississippi, but that, upon the other hand, such contracts were entered into and performed wholly within the State of Tennessee, where the appellant collected the contract price thereof. That, for the purpose of entering into said contracts and performing the same, he adopted a situs in the State of Tennessee. He therefore alleged that he was not liable for income contracted for and earned in carrying on an occupation wholly beyond the limits of the State of Mississippi in the State of Tennessee. The petition alleged that he had appeared before the Tax Commissioner of the State of Mississippi and the Mississippi State Tax Commission and made all objections, and had done such things as were required of him

under the statute, and alleged that he had met an adverse ruling at the hands of the Commission.

The appellant, in his said petition for rehearing in the Chancery Court of the First Judicial District of Hinds County, Mississippi, specifically set up that said statute violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellant of his property without due process of law and denied to him the equal protection of the law. R. 2-14. At R. 8, the following language is used:

> "Complainant avers that no tax whatever was then and there due, and it was unlawful on the part of the Mississippi State Tax Commission to make said additional assessment against complainant, and it was unlawful on the part of the Mississippi State Tax Commission to deny complainant's petition for a review, but that, on the other hand, said assessment should have been reviewed as prayed for by complainant. That said petition for appeal and review before the entire Commission was filed by the complainant within one year from the date of the notice given to complainant of the assessment of any additional tax.
>
> "Complainant shows unto the court that Section 11, Chapter 132, Mississippi Laws 1924, as amended by Chapter 32, Mississippi Laws 1928, extraordinary session, violates the Fourteenth Amendment to the Constitution of the United States in that the same deprives the complainant of his property without due process of law and denies to him the equal protection of the law."

The appellant further alleged that in carrying on in the State of Mississippi and in the surrounding states, including Tennessee, he was engaged in active competition with domestic and foreign corporations, and that under the act complained of, domestic corporations were not required to include in their gross income income earned wholly beyond the limits of the state, and that, therefore, said statute violated the Fourteenth Amendment to the Constitution of the United States, in that it discriminated against the appellant, an individual, in favor of domestic and foreign corporations. R. 9.

Again, R. 10, the appellant, in his petition for rehearing, challenged the constitutionality of the act in question as being in violation of the Fourteenth Amendment to the Constitution of the United States, in that the same imposed liability upon him for income earned wholly and exclusively beyond the limits of the state in carrying on an occupation entered into in the State of Tennessee, the language being as follows, R. 10:

> "That the legislature of the State of Mississippi is without power and authority to impose and/or collect tax on gains, profits or income derived and earned beyond the limits of the state, and that Section 32, Mississippi legislature, extraordinary session, 1928, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of property without due process of law and denies to him the equal protection of the law thereby."

The petition for rehearing, in accordance with the statute, made the proper state officials parties thereto and pray-

ed that a judgment be rendered in accordance with the provisions of the statute, vacating and setting aside the assessment complained of therein. R. 11.

To this petition for rehearing, the Attorney General of the State of Mississippi, for and on behalf of the Mississippi State Tax Commission, filed a demurrer, R. 17.

The matter came on for hearing before the Chancery Court of the First Judicial District of Hinds County, Mississippi. The demurrer filed on behalf of the Mississippi State Tax Commission by the Attorney General of the State of Mississippi was sustained, and a final judgment rendered against appellant and the Fidelity & Deposit Company of Maryland, his surety, for the amount of the tax complained of, R. 19.

S. B. Lawrence and the Fidelity & Deposit Company of Maryland prosecuted an appeal to the Supreme Court of the State of Mississippi by giving a bond for the amount and in the form provided by the statute, R. 20. In the Supreme Court of the State of Mississippi, S. B. Lawrence and the Fidelity & Deposit Company of Maryland, his surety, filed an assignment of error, wherein it was claimed that Chapter 32, Miss. Laws of 1928, extraordinary session, being an amendment to Section 11, Chapter 132, Miss. Laws of 1924, being Section 5033, Mississippi 1930 Code, as construed and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law. R. 23.

The Supreme Court of the State of Mississippi affirmed the action of the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, in affirming the judgment against appellants, R. 27, used the following language:

> "The Mississippi State Tax Commission, in accordance with the provisions of the Mississippi statutes on the subject, took steps to assess him with the income tax imposed by law. The appellant appeared before the State Tax Commission and objected to the assessment of the said income tax, contending that he is not subject to the income tax upon money earned outside of the State of Mississippi in the contract above referred to; that the state could not, under the 14th section of the Bill of Rights of the State of Mississippi, or the 14th amendment to the Constitution of the United States, impose liability for income earned as result performing labor or pursuing an occupation beyond the limits of the state, and in the limits of another state. On the hearing, the Tax Commission assessed him with an income tax on the income earned out of the state. The appellant thereupon filed a bill in chancery in accordance with Section 5057, Code of 1930, to review the assessment. He contended that Chapter 32, extraordinary session Mississippi legislature 1928 did not impose liability for income earned wholly out of the State of Mississippi; that if the statute should be so construed and enforced as to impose liability upon him for such income, then the statute would violate the above sections of the Constitution."

Upon the question of discrimination by reason of the

fact that domestic corporations were not required to include gross income earned wholly beyond the limits of the state, the court held that such provision itself was stricken down, and that both individuals and domestic corporations were liable for income earned wholly beyond the limits of the state. Accordingly, judgment was rendered against S. B. Lawrence, appellant, the Fidelity & Deposit Company of Maryland, surety on his bond from the State Tax Commission to the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Maryland Casualty Company, surety on the bond of both of them to the Supreme Court of the State of Mississippi. Both of said sureties join in this appeal as appellants.

The Supreme Court of the State of Mississippi, in construing its own constitution and statutes, held that a tax could not be imposed merely upon the use or ownership of property. *Thompson vs. Kreutzer*, 112 Miss. 165, 72 So. 891; *Thompson vs. McLeod*, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674.

The tax was not a lieu tax, because under Section 112 of the Mississippi State Constitution, the appellant Lawrence was liable for an ad valorem tax on all property owned by him in the State of Mississippi; said section being found in Appendix II hereto, the same providing that taxation shall be equal and uniform, and that all property shall be assessed at its true value.

In the case of *Chicago, R. I. & P. R. R. Co. vs. Robertson, Rev. Agent*, 122 Miss. 417, 84 So. 449, the court held that Chapter 113, Miss. Laws of 1912, providing for a fixed

charge on the gross receipts of a freight line company in lieu of all taxes on the property of the company used in its business in the state was void as violative of Section 112 of the state constitution. If the income tax complained of had been a property tax, it would have been void under Section 112 of the state constitution aforesaid. See Appendix II. *Thompson vs. Kreutzer*, 112 Miss. 165, 72 So. 891; *Thompson vs. McLeod*, 112 Miss. 383, 73 So. 193.

Money not subject to taxation in Mississippi Code, Sec. 3108, Appendix III.

In the case of *State ex rel. Knox vs. G. M. & N. R. R. Co.*, 138 Miss. 70, 104 So. 689, at page 99, the court used the following language:

> "The question presented for decision in these cases is the validity vel non of the Income Tax Act, (Chap. 132, Laws of 1924), by which a tax is imposed on all but certain excepted net incomes from whatever source derived. The ground on which it is claimed that the act is void is that it is in conflict with the Fourteenth Amendment to the Federal Constitution and with several sections of the State Constitution, to which, when necessary, reference will be hereinafter specifically made.
>
> "As to the provision of Section 112 of the State Constitution, that 'property shall be taxed in proportion to its value,' and 'shall be assessed for taxes under general laws, and by uniform rules, according to its true value:'

"The appellees' contention in this connection is that a tax on income derived from property is a tax on the property from which the income is derived, and, as the tax here imposed is on all income, it was, insofar as it affects income from property, a tax on the property from which the income was derived, which property the Constitution permits to be taxed only in proportion and according to its true value.

"This contention is ruled by *Hattiesburg Grocery Co. vs. Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748, wherein this court, after mature consideration, held that a tax on income is an excise and is not a tax on the property from which the income may have been derived. As was there pointed out, a tax on income from property includes some of the elements both of a tax on property and of a tax on persons, and can not be classified as strictly a tax on either alone. Property of itself alone can not produce income, but must be used or dealt with in some way by a person before gain or income can be derived therefrom, and no definition of income, though derived from property, can be framed which does not include the activities of the person by whom it was produced, received or enjoyed.

"A tax, though not eo nomine on property, but which the owner thereof must pay merely because of his ownership of the property, (*Thompson vs. Kreutzer*, 112 Miss. 165, 72 So. 891), or because of a special use of property without reference to whether or not revenue or gain is derived therefrom, (*Thompson vs. McLeod*, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674), is a tax on the property, and should be in proportion and according to the value thereof. *But*

the tax here imposed is not on the ownership or use without gain of property, but is on the revenue which the activities of the owner cause the property to produce. The taxation of such property is universal, and is the basis of most of our privilege taxes."

In other words, the tax imposed by the statute, as construed by the Supreme Court of the State of Mississippi, is an excise, occupation or privilege tax on the activities of the owner, which activities of the owner took place wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee, where contracts for the construction of highways were entered into, executed and performed, and the compensation therein collected, and it is this income contracted for and earned in carrying on an occupation wholly beyond the limits of the State of Mississippi, in the State of Tennessee, that is taxed as an excise or occupation tax. Such is the construction placed upon the act by the Supreme Court of the State of Mississippi, which is binding upon this court. *Bandini Pet. Co. vs. Superior Court of the State of California,* October term, 1931, No. 43, decided Nov. 23, 1931, Advance Sheets, 76 L. Ed. 123; *Lindsey vs. Natural Carbonic Gas Co.,* 220 U. S. 61, 73, 55 L. Ed. 369, 375. Such construction is part of the statute, and is binding on this Court. *Farmers Irrigation Dist. vs. Nebraska,* 244 U. S. 325, 61 L. Ed. 1168; *New York ex rel. New York & Queens Gas Co., vs. McCall,* 245 U. S. 345, 62 L. Ed. 337; *La Tourette vs. McMaster,* 248 U. S. 465, 63 L. Ed. 362; *Vigliotti vs. Pa.,* 258 U. S. 403, 66 L. Ed. 686; *Supreme Lodge vs. Meyer,* 265 U. S. 30, 68 L. Ed. 885; *Supreme Lodge vs. Eiser,* 265 U. S. 41, 68 L. Ed. 891.

D.

(1) CASES SUSTAINING JURISDICTION

The statute of the State of Mississippi complained of violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law, in that the statute as construed and enforced in this case, imposed liability upon the appellant for an excise, occupation or privilege tax for income contracted for and earned in following an occupation wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee. Consistent with the Fourteenth Amendment to the Constitution of the United States, a state may not tax persons, property or an occupation, or the income earned therefrom, beyond the limits of the state. Cleveland P. & A. R. Co. vs. Pa., 15 Wall. 300 319, 325, 21 L. Ed. 179, 186, 188; *Louisville & J. Ferry Co., vs. Kentucky*, 185 U. S. 385, 396,47 L. Ed. 513, 518, 23 Sup. Ct. Rep. 463; *Old Dominion S. S. Co. vs. Virginia*, 198 U. S. 299, 49 L. Ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; *Delaware, L. & W. E. Co. vs. Pennsylvania*, 198 U. S. 341, 356, 49 L. Ed. 1077, 1083, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; *Western U. Teleg. Co. vs. Kansas*, 216 U. S. 1, 38, 54 L. Ed. 355, 370, 30 Sup. Ct. Rep. 190; *International Paper Co. vs. Massachusetts*, 246 U. S. 135, 142, 62 L. Ed. 634, 639, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; *Rees' (Hans) Sons vs. North Carolina*, 283, U. S. 123, 75 L. Ed. 879; *Farmers' Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 74 L. Ed. 371; *Safe Dep. & Trust Co.*, 280 83, 74 L. Ed. 180; *Nat'l Life Ins. Co. vs. United States*, 277 U. S. 508, 72 L. Ed. 968; *Brooke vs. City*

of Norfolk, 277 U. S. 27, 72 L. Ed. 767; *Rhode Island Hospital Trust Co. vs. Doughton, Comm'r*, 270 U. S. 69, 70 L. Ed. 475; *Frick vs. Commonwealth of Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058; *St. Louis Cotton Compress Co. vs. State of Arkansas*, 260 U. S. 346, 67 L. Ed. 297; *Shaffer vs. Carter*, 252 U. S. 37, 64 L. Ed. 445; *Provident Life Assurance Soc. vs. Commonwealth of Kentucky*, 239 U. S. 103, 60 L. Ed. 167; *Hawley vs. City of Malden*, 232 U. S. 1, 58 L. Ed. 477; *Allgeyer vs. State of Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *C. P. & A. R. R. Co. vs. Pennsylvania*, 82 U. S. 300, 21 L. Ed. 179; Opinion of Justice, (Nov.) 149 Atl. 321.

(2) *Since an occupation carried on wholly beyond the limits of the state may not be taxed at the source, the income arising therefrom may not, consistent with the Fourteenth Amendment to the Constitution of the United States, be taxed.* *Gillespie vs. State of Oklahoma*, 257 U. S. 501, 66 L. Ed. 338; *Indian Territory Illuminating Oil Co. vs. Oklahoma*, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453; *Pollock vs. Farmers' Loan & T. Co.*, 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673; *Moseley vs. State*, 115 Tenn. 57 86 S. W. 714; *Brushaber vs. Union P. R. Co.*, 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *William E. Peck & Co. vs. Lowe*, 247 U. S. 163, 62 L. Ed. 1049, 38 Sup. Ct. Rep. 432; *Eisner vs. Macomber*, 252 U. S. 189, 64 L. Ed. 521, 9 A. L. R. 1570, 40 Sup. Ct. Rep. 189; *Evans vs. Gore*, 253 U. S. 245, 64 L. Ed. 887, 40 Sup. Ct. Rep. 550.

Each of the foregoing cases is an authority that this court has jurisdiction of the present case under Section 237 (a) Judicial Code, being Section 344 U. S. C. A.

(3) In the case of *State ex rel. Knox, Attorney General, vs. R. R. Co.*, 138 Miss. 70 Supra, in justifying its hold-

ing that it could tax income, whether earned within or without the state, the Supreme Court of the State of Mississippi referred to *Maguire vs. Trefry*, 253 U. S. 12, 64 L. Ed. 738.

In that case, Miss Emily Maguire was a resident of Boston, Mass. She was the beneficiary of a trust estate consisting of intangibles in the hands of a trustee in the State of Pennsylvania, from which trust estate she acquired certain income. There are two differences between that case and the one before the court. In that case, the securities were intangibles, and the doctrine of mobilia sequuntur personam applied. In other words, the situs of the intangibles followed the domicile of the beneficiary, which was in Massachusetts. The second difference is that the tax was not an excise tax, but a property tax according to the laws of the State of Massachusetts. *Tax Commission vs. Putnam*, 227 Mass. 522, L. R. A. 1917F, 806, 116 N. E. 804.

This court has recently had occasion to limit the application of the case in *Safe Deposit & Trust Co. vs. Virginia*, 280 U. S. 83, 74 L. Ed. 180, in respect to which the following language was used by this Court:

> "The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire vs. Trefry*, supra."

That is to say, the tax imposed by the State of Massachusetts was intended as the equivalent of a property tax upon the fair value of any interest which the appellant had in the securities measured by the income arising therefrom.

Suppose, however, that the appellant, though living in Massachusetts, had each day gone into Pennsylvania and followed some occupation, such as a day laborer, clerking in a store or selling goods. It could not be contended that an excise, privilege or occupation tax could have been imposed upon her for performing manual labor in another state. And the case of *Maguire vs. Trefry*, supra, is not an authority for such position. As a matter of fact, we have the converse of the proposition in the Supreme Court of the State of Massachusetts in the case of *Hutchins et al. vs. Commissioner of Taxation*, 172 N. E. 605. In that case, a trust estate was situated in the State of New York. The trustees, however, resided in the State of Massachusetts. The Supreme Court of Massachusetts held that the income was not subject to taxation, using the following language:

> "In our opinion, it follows that there was no jurisdiction to levy the taxes on the gains of the two New York trusts. For discussion of cognate questions, see *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 202, 26 Sup. Ct. Rep. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Frick vs. Pennsylvania*, 268 U. S. 473, 488, 489, 45 Sup. Ct. Rep. 603, 69 L. Ed. 1058, 42 A. L. R. 316; *Rhode Island Hospital Trust Co. vs. Doughton*, 270 U. S. 69, 46 Sup. Ct. Rep. 256, 70 L. Ed. 475, 43 A. L. R. 1347; *Blodgett vs. Silberman*, 277 U. S. 1, 12, 18, 48 Sup. Ct. Rep. 410, 72 L. Ed. 749; *Brooke vs. Norfolk*, 277 U. S. 27, 29, 48 Sup. Ct. Rep. 422, 72 L. Ed. 767."

The Supreme Court of the State of Mississippi likewise cited, 138 Miss. 70, at page 108, the case of *Shaffer vs. Carter*, 252 U. S. 37, 64 L. ed. 445. That case, however, holds just the opposite, since it is expressly announced therein that

the power of a state to impose liability for an excise tax is confined to the boundary of the state itself.

(4) *Appellants' petition alleges, and the demurrer admits that in the construction of highways in Mississippi, Tennessee and other states, the appellant Lawrence was in direct competition with individuals and domestic and foreign corporatinos; that no liability could be imposed upon foreign corporations, and the legislature had undertaken to relieve domestic corporatoins from the necessity of including as part of gross income that earned wholly beyond the limits of the state. Such classification was arbitrary, discriminatory and rendered the statute unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States, for the reasons hereinbefore set out.*

W. A. Frost vs. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483; *Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927; *Southern Railway Co. vs. Green*, 216 U. S. 400, 54 L. Ed. 536; *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. Ed. 989; *Chalker vs. Railway Co.*, 249 U. S. 522, 63 L. Ed. 748.

Assuming the soundness of the court's position that income earned from an occupation beyond the limits of the state, was subject to an excise tax on the part of the State of Mississippi, which of course is denied, the discrimination is not removed, nor is the arbitrary nature of the tax alleviated or the statute rendered any less in conflict with the Fourteenth Amendment to the Constitution of the United States by the holding of the court that both domestic corporations and individuals were liable for the tax, since the petition alleged and the demurrer admitted that for the year 1929, the Tax Commission had knowingly, uniformly and intentionally relieved domestic cor-

porations from the liability. R. 9-10. The Tax Commission, the authoritative taxing body, acting for and on behalf of the State, for the year 1929 relieved domestic corporations from the liability. Appellants have no authority, nor has the Supreme Court of the State of Mississippi any authority to impose the same or compel the payment of the tax or imposition of liability therefor.

In the recent case of *Iowa-Des Moines Nat'l Bank vs. E. R. Bennett, Chairman,* Nos. 15 and 16, docket of this Court, October 1931, opinion by Mr. Justice Brandeis, December 14, 1931, the following language was used:

> "The petitioners' rights were violated, nad the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, pomptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased of their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of Federal law, can not be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co. vs. Board of Revision,* supra; *Greene vs. Louisville & Interurban R. R. Co.,* 244 U. S. 499, 514-518; *Chicago Great Western Railway Co. vs. Kendall,* 266 U. S. 94, 98; *Sioux City Bridge Co. vs. Dakota County,* supra. Nor may he be remitted to the necessity

of awaiting such action by the state officials upon their own initiative. *Montana Nat'l Bank vs. Yellowstone County*, supra."

See, also, dissenting opinion, Supreme Court of the State of Mississippi, present case, R. 31, and cases therein cited.

(5) *The question was properly raised of record, and the imposition of liability on the appellants necessarily involved the question as to whether or not income wholly earned from an occupation contracted for and performed wholly beyond the limits of the state, may consistently with the Fourteenth Amendment to the Constitution of the United States be taxed by the State of Mississippi in this case. It was necessary for the Supreme Court of Mississippi to decide the question adversely to the appellants in order to render the judgment which it rendered.*

Kaukauna Water Power Co. vs. Green Bay & Miss. Canal Co., 142 U. S. 254, 35 L. Ed.1004; *Green Bay & Miss Canal Co. vs. Patten Paper Co.*, 172 U. S. 584, 43 L. Ed. 364; *Dewey vs. City of Des Moines*, 173 U. S. 193, 43 L. Ed. 665; *Murray vs. City Council of Charleston*, 96 U. S. 432, 24 L. Ed. 760; *Schlemmer vs. Buffalo, R. & P. Railway Co.*, 205 U. S. 11, 51 L. Ed. 686; *Detroit F. W. & Belle Isle Railway Co. vs. Osborn*, 189 U. S. 387, 47 L. Ed. 863.

Respectfully submitted,

WILLIAM H. WATKINS,

R. W. HEIDELBERG,

Attorneys for Appellant.

APPENDIX I

Chapter 124, Vol. 2, Mississippi Code 1930 Annotated

5027. IMPOSITION OF THE TAX.—There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1930 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: On the first $2,000.00 of taxable income, or any part thereof, at the rate of two and one-half per centum; on the next $3,000.00 of taxable income, or any part thereof, at the rate of three and one-half per centum; on the next $10,000.00, or any part thereof, at the rate of four and one-half per centum; on all taxable income in excess of $15,000.00, at the rate of five and one-half per centum.

(2) A like tax is hereby imposed to be assessed, collected and paid annually at the rates specified in this section and as hereinafter provided upon and with respect to the entire net income, from all property owned and from every business, trade or occupation carried on in this state by individuals, corporations partnerships, trusts or estates, not residents of the state of Mississippi.

(3) In the case of taxpayers subject to this tax having a fiscal year ending in 1930, the tax shall be determined by:

(2) Computing for a full year the amount of tax due, and considering the exemptions and credits allowed hereunder.

(b) By computing the amount of tax due for a full year, after considering the credit and exemptions allowed herein.

(c) The same ratio of the tax determined under (a) of this paragraph which the number of months in 1929 bear to the total number of months in the fiscal period;

(d) The same ratio of the tax computed under (b) of this paragraph which the number of months in 1930 bear to the number of months in the fiscal period;

(e) The amount of tax due for the fiscal period shall be the sum determined under (c) of this paragraph plus the amount determined under (d) of this paragraph.

1928 Ex. Ses. ch. 24; 1924 ch. 132.

5028. TAX IS ADDITIONAL PERSONAL DEBT.—The tax herein imposed is in addition to all other taxes imposed by law, and every tax in addition to being a tax against the property, business, trade, profession, or occupation, shall also become from the time it is due and payable, a personal debt from the taxpayer liable to pay the same, to the State of Mississippi.

1924 ch. 132.

5031. NET LOSSES.—(a) As used in this section the term net loss, means only net losses resulting in the operation of any trade or business regularly carried on by the taxpayer, including losses sustained from the sale or other

disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business.

(b) If for any taxable year it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year and if the net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year, the deduction in all cases to be made under regulations prescribed by the commissioner with the approval of the governor.

(c) The benefit of this section shall be allowed to members of partnerships and the beneficiaries of any estate or trust, under regulations prescribed by the commissioner with the appoval of the governor.

(d) It appears upon the production of evidence satisfactory to the commissioner, that a taxpayer having a fiscal year beginning in 1929 and ending in 1930 after the adoption of this chapter has sustained a net loss during such fiscal year, such taxpayer shall be entitled to the benefits of this section in respect to the same proportion to such net loss which the entire portion of such fiscal year falling within the calendar year 1930 after said adoption is of the entire fiscal year.

(e) The benefits of this section may be allowed for

a period of three years from the date such loss is sustained, and not thereafter.
1924 ch. 132.

5033. GROSS INCOME DEFINED.—For the purposes except as otherwise provided for non-resident, the term gross income:

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real, or personal growing out of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transactions of any business carried on for gain or profit or gains, or profits, and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received.

(b) The term gross income, does not include the following items which shall be exempt from taxation hereunder:

(1) The proceeds of life insurance policies and contracts paid upon the death of the insured.

(2) The amount received by the insured as a return

of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract.

(3) The value of property acquired by gift, bequests, devise or descent, but the income from such property shall be included in the gross income.

(4) Interest upon the obligations of the United States or its possessions or securities issued under the provisions of the federal farm loan act of July 17, 1916, or bonds issued by the war finance corporation or the obligations of the state of Mississippi or political subdivisions thereof or of any municipal corporation.

(5) The amounts received through accident or health insurance as compensation for personal injuries or sickness, plus the amount of any damages received for such injuries or such sickness or injury, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

(6) Salaries, wages, and other compensation received from the United States government or officials or employees thereof, including persons in the military or naval forces of the United States.

(7) Income received by any religious denomination or by any institution or trust for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes

or for the enforcement of laws relating to children or animals or for two or more of such purposes if such income be used exclusively for carrying out one or more of such purposes.

(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax, or dividends from a national bank or state bank organized under the laws of the state of Mississippi.

(9) In the case of taxpayers other than residents, gross income, includes gross income from sources within this state.

(10) In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policyholder as is paid back or credited to or treated as an abatement of premium of such policyholder within the taxable year.

(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising.

1918 Ex. Ses. ch. 32.

5034. DEDUCTIONS ALLOWED.—(a) In computing the net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade

or business and including rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or business, of property which the taxpayer has not or is not taking title or in which he has no equity; and all necessary expenses incurred by those forced to leave home in order to do the work they are employed to do.

(2) All interest paid or accrued during the taxable year on indebtedness, except interest upon indebtedness for the purchase of tax free bonds, or stock in a national bank or bank organized nuder the laws of the state of Mississippi.

(3) Taxes, other than income taxes, paid or accrued within the taxable year imposed; first by the authority of the United States or any of its possessions; second, by the authority of any state or territory, or any county, school district, drainage or levee district, municipality or other taxing subdivision of any state or territory; third by the authority of any foreign government.

(4) Losses sustained during the taxable year not compensated for by insurance or otherwise, if incurred in trade or business.

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only such transactions in real property or in tangible personal property having an actual situs within the state.

(6) Losses sustained during the taxable year of property not connected with the trade or business if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

(7) Debts ascertained to be worthless and charged off during the taxable year.

(8) A reasonable allowance for exhaustion, wear and tear of property used in the trade or business, and depreciation upon buildings based upon their reasonable value on March 16th, 1912, if acquired prior thereto, and upon cost if acquired subsequent to this date.

(9) In the case of timber a reasonable allowance for depletion based upon cost; provided it was acquired prior to March 16th, 1912, the fair market value on that date shall be taken in lieu of cost.

(10) Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by law to an amount not in excess of ten per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the commissioner with the approval of the governor. In the case of a non-resident this deduction shall be allowed only

as to contributions or gifts made to domestic corporations, or to such vocational rehabilitation fund.

(11) Contributions made within the taxable year to religious, charitable, scientific, or educational associations, not incorporated, or to persons for exclusive use for religious, charitable, scientific or educational purposes, to be allowed under regulations and rules made by the commissioner with the approval of the governor, not exceeding ten per centum of the taxpayer's net income during the taxable year, without the benefits of this section; and the benefits of this section must be considered in connection with the preceding section in determining the amount of the deduction under this section and the next preceding section, and shall in no event exceed ten per centum of the taxpayer's net income without the benefits of this and the preceding section, provided further no receipt shall be demanded under such rules and regulations unless the commissioner shall have cause to believe that the deductions claimed under this section is (are) fraudulent.

(12) In the case of insurance companies the net additions required by law to be made within the taxable year to reserve funds.

(13) The sums other than dividends, paid within the taxable year on policy and annuity contracts.

1924 ch. 132.

5056. REVISION BY COMMISSIONER.—A taxpayer may apply to the commissioner for revision of the tax

assessed against him, at any time within one year from the time of the filing of the return or from the date of the notice of the assessment of any additional tax. The commissioner shall grant a hearing thereon and if, upon such hearing, he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts and adjust the computation of the tax accordingly. The commissioner shall notify the taxpayer of his determination and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. If the taxpayer has failed, without good cause, to file a return within the time prescribed by law, or has filed a fraudulent return, or having filed an incorrect return, has failed, after notice, to file a proper return, the commissioner shall not reduce the tax below the amount for which the taxpayer is found to be properly assessed.

After the time for making of the returns by taxpayers in each year has passed the state tax commission shall arrange for hearings at the state capitol and give such notice thereof as may be deemed requisite. The expense of such hearings shall be paid out of funds appropriated for the enforcement of this chapter including the traveling expenses of the members of the commission and its necessary employees. Two members of the state tax commission shall constitute a quorum at such hearings.

1924 ch. 132.

5057. REHEARING.—In all hearings before the commission, under this chapter, oral, documentary and other evidence may be introduced by either party and the

findings of the commission shall be final unless the taxpayer, or the state, by the attorney-general, shall, within thirty days from the date of the receipt of notice of such findings, file a petition in the chancery court of Hinds County, at the seat of government, requesting a hearing of the case on its merits, which petition shall be a concise statement of the facts as contended for by the party dissatisfied with the findings of the commission. If the taxpayer be the party filing said petition it shall be accompanied with a bond, to be approved by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. On filing such petition the clerk of the court shall give the opposite party (the attorney-general, if the petition is filed by the taxpayer) notice of the proceedings as required by law. The chancery court shall have jurisdiction to hear and determine said cause, on issue joined, as in other cases. If the petition be filed by the attorney-general for the state, and the taxpayer be not a citizen of Hinds County, on the application of the taxpayer, the suit shall be transferred to the county in this state of which the taxpayer is a citizen. Or the attorney-general may file this petition in the first instance in the chancery court of the county of which such taxpayer is a citizen, which court in either case shall have jurisdiction to hear and determine the case on issues joined therein. Either the state or the taxpayer, or both, shall have the right of appeal to the Supreme Court, as in other cases.

1924 ch. 132.

APPENDIX II.

Constitution of the State of Mississippi.

Section 112. Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by unifom rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroads and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.

APPENDIX III

MISSISSIPPI CODE 1930 ANNOTATED. Chapter 61. REVENUE..

3108. WHAT PROPERTY EXEMPT.—The following shall be exempt from taxation:

. . . . . .

(x) Any and all money on deposit in either national banks, state banks or trust companies, on open account, savings account and time deposit.

1928 ch. 185; 6878; 4251; 3744; 468; 1662; ch. 8 art. 11; ch. 8 art. 2 (1).

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 580

S. B. LAWRENCE ET AL., APPELLANTS,

vs.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED DECEMBER 19, 1931

(36,394)

(36,394)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 4, 1932

[fols. a & 1] [Caption omitted]

[fol. 2]

IN CHANCERY COURT OF HINDS COUNTY

No. 18865

S. B. LAWRENCE

vs.

STATE TAX COMMISSION et al.

PETITION—Filed Jan. 10, 1931

To the Honorable Chancery Court, First Judicial District, Hinds County, Mississippi:

Comes S. B. Lawrence, adult citizen and actual resident of the City of Jackson, in the First Judicial District of Hinds County, Mississippi, and complaining herein of Lester C. Franklin, Chairman of the State Tax Commission, Webb Walley and H. H. Casteel, members of the State Tax Commission, and A. S. Coody, its Clerk, in pursuance of Section 5057, Mississippi Annotated Code 1930, respectfully prays an appeal and requests a review of the proceedings had and done in that certain cause lately pending before the State Tax Commission, styled, In the Matter of S. B. Lawrence, Income Tax, determined adversely to petitioner on the 20th day of December, 1930, and with reference thereto, complainant respectfully shows unto the Court the following statement of facts:

That for the year 1929 he had no taxable income earned within the borders of the State of Mississippi.

That in the year 1929, he earned profits in the amount of $50,949.36 wholly within the State of Tennessee, and that such profits were earned in the fulfillment of certain contracts entered into for the construction of roads with political subdivisions of the State of Tennessee, wholly within the State of Tennessee, no part of which was done or performed in the State of Mississippi.

That for the year 1929, his net income, before deducting income taxes, but after deducting donations, was $49,905.67, which included the aforementioned earnings and profits earned in the State of Tennessee from contracts performed in Tennessee.

[fol. 3] That for the year 1927, he paid state income tax in the amount of $1,977.95, during the year 1928.

That for the year 1927, he paid federal income tax in the amount of $4,965.11, no part of which was deducted from income in determining the income on which state income tax of $1,977.95 was assessed.

That for the year 1929, his federal income tax amounted to $4,830.14, no part of which was deducted in determining the net income of $49,905.67, all of which, as aforesaid, was wholly earned and collected without the State of Mississippi, and in the State of Tennessee, by virtue of the performance of certain contracts entered into in the said State of Tennessee, with political subdivisions of the said State of Tennessee.

Prior to the 29th day of October, 1930, the Tax Commission of the State of Mississippi gave to the said S. B. Lawrence, Complainant, notice of an additional assessment for the year 1929, amounting to $2,288.31.

That complainant being aggrieved at the action of the Commission, under date of October 29th, 1930 appealed from said additional assessment.

That upon November 11th, 1930, complainant filed with the Mississippi State Tax Commission a written statement setting out the position of Complainant in respect thereto.

"November 11th, 1930.

IT-101/7831.
HNE: E/838.
S. B. Lawrence, Jackson, Miss.

Assessment of income tax for the Calendar year 1929, in the amount of $2,288.31, together with interest at 6%, or $102.97.

State Tax Commission, Jackson, Mississippi.

GENTLEMEN: In the matter of the above assessment of [fol. 4] Income Tax, application for hearing of appeal has been duly made to the Commissioner, in accordance with Section 35 of the Income Tax Law of 1924, as amended.

Under interpretation of Section 11, Chapter 132, Laws of 1924 (Income Tax Law) as amended by House Bill No. 283; Special Session, 1928, the Commissioner has held that profits in the amount of $50,949.36 earned by this tax-payer, wholly within the State of Mississippi should be included his taxable income, computing a proposed tax of $2,288.31.

The following facts are necessary for a consideration of the contentions of tax payers hereinafter set forth:

(1) Tax-payer had profits for the year 1929 of $50,949.36 earned wholly without the State of Mississippi; namely profits on contracts for the construction of roads in the State of Tennessee with bond there approved under supervision of State authority, and by and through a plant established in said State of Tennessee.

(2) Tax-payer is a citizen of Mississippi.

(3) For the year 1927 tax-payer paid Federal Income Tax to the amount of $4,965.11, which tax was not deducted in determining net income for purposes of State Income Tax for the year 1927.

(4) That for the year 1929 Tax-Payer paid Federal Income Tax in the amount of $4,830.14, which amount has not been deducted in determining the alleged net income of $4,905.67, on which alleged income of $49,905.67 the proposed tax of $2,288.31 is assessed.

(5) That for the year 1927 tax payer paid income tax to the State of Mississippi in the amount of $1,977.95, predicated on a net income of $50,259.03.

(6) That regulations No. 1 and No. 2 promulgated by the Commissioner denied tax-payer the benefit of the deduction of Federal Income tax paid in determining net income [fol. 5] subject to income tax to State of Mississippi. Such regulations being the interpretation of Section 12 of Chapter 132, Laws of 1924.

(7) That tax-payer has filed claim for credit for excess income tax paid the State of Mississippi for the year 1927 in the amount of $248.25. The claim for refund asserted tax-payer's right to deduct Federal Income Tax before determining income subject to tax by the State of Missis-

sippi. The claim for refund was rejected by the Commissioner.

(8) That under Section 41 of the Income Tax Law of 1924 when there no remaining appropriation available for refund of income tax over paid, yet a tax-payer has, within the period of limitation sustained the right to such overpayment, a certificate of over-assessment will be issued to tax-payer, to be used in paying future income tax or to be held until such time as funds are made available by appropriation for refund.

Tax-payer now submits that there is no tax due for the year 1929; but that there is due to be issued a certificate of over-assessment in the amount of $248.25 for taxes improperly assessed for the year 1927.

Tax payer submits that as to earnings outside the State of Mississippi an enforcement of the tax imposed by Section 4, of the Income Tax Law of 1924 would render same unconstitutional, as violative of the 14th Amendment to the Constitution of the United States in that such construction of the statute would deprive him of his property without due process of law and deny to him equal protection of the law, because (1) the earning or income was exclusively earned outside the State, (2) such earning is not subject to taxation upon the part of a foreign corporation doing business within the state, (3) that a non-resident of the [fol. 6] State of Mississippi, doing business in the State under similar circumstances is not subject to tax under the conditions obtaining herein, (4) that under House Bill No. 283, Special Session 1928, amending Section 11 of Chapter 132, Laws of 1924, (Income Tax Law) such an earning is not subject to taxation upon the part of a domestic corporation under similar circumstances. Section 112 of the Constitution of Mississippi provides taxation must be equal throughout the State, and Section 181 provides that corporations shall be taxed as individuals.

Tax-payer contends that Section 12 of Chapter 132, Laws of 1924, (Income Tax Law) does not prohibit the deduction of Income Taxes paid to the United States of its possession; but submits that if it should be held that such section did intend so to disallow the deduction of such income taxes then such disallowance is confiscatory to principle

in that the State of Mississippi has no regulatory power over the rate and amount of income tax that might be imposed by the United States and its possessions. This is particularly true as to the income here taxed. Following the rule proposed to be applied, there is nothing to prevent the State of Tennessee from imposing an income tax equal to or exceeding 50 per centum of the income earned within its borders, and to disallow the deduction of any income tax paid to the State of Mississippi on such earnings in determining the income to be taxed; and for the State of Mississippi to impose a tax equal to 50% of net income determined without the benefit of deducting the income tax paid to the State of Tennessee. If the foregoing condition should obtain, and the taxes so indicated were imposed by the States, then as to the year of 1929, on the agreed net income of taxpayer, the following would result:

"Net income subject to tax by the State of Tennessee	$50,949.36
Net income subject to tax by the State of Mississippi	49,905.67
Income Tax imposed by Tennessee	$25,474.68

[fol. 7]

Income Tax imposed by Mississippi	24,952.83
Total Tax	$50,427.51

The actual net income of tax payer for the year 1929 was $49,905.67 before deduction of Federal Income tax paid. Taxpayer, under the conditions outlined would have paid no Federal Income Tax, but would have paid income tax to the two states in a total amount that would have exceeded the net income by $521.84. It matters not that the State of Tennessee at present imposes no tax on income, and that the tax imposed by the State of Mississippi does not approximate the rate employed above, nor is it pertinent that the present tax on income is at graduated rates, such a method being optional with the tax imposing powers, and the rates, though graduated could be increased to produce a tax equal to or greater than 50 per centum.

Chapter 132 of Laws of 1924 is an act levying an income tax. The predicate for the tax must necessarily be income. Can income be determined without the benefit of the deduction of income tax? Could there be excluded from the deductions to be employed in determining income the items of expense that are necessary to the receiving of the income so taxed, such as rent, labor, ad valorem taxes, privilege taxes, etc.? Income Taxes imposed by the United States are as mandatory as the taxes imposed by political subdivisions of the State of Mississippi.

Section 29 of Chapter 132, Laws of 1924, provides a limitation period of three years from the date of filing of a return in which assessment of additional taxes can be made. Section 35 of the statute limits the time in which tax-payers can apply for a revision of taxes assessed to one year from the date of filing of return or of assessment. It would appear then that income tax return of taxpayer for the year 1927 is subject to review by the Commissioner and assessment of any additional tax that might be determined to be due, whereas tax-payer has not the right to apply for a revision of the tax assessed for the year 1927. If such is the construction, then it is unconstitutional in that it is [fol. 8] violative of the 14th Amendment to the Constitution of the United States.

Tax-payer now submits that if it be held that income earned without the State of Mississippi is subject to tax under Chapter 132, Laws of 1924, then the income of $49,905.67 be first reduced by the amount of $4,830.14, Federal Income Tax for the year 1929, and that the tax be calculated on the true net income of $45,075.53, and that from the resulting tax of $2,022,65 there be deducted the amount of $248.25 (together with interest thereon at 6% from March 15, 1928) being taxes improperly paid for the year 1927.

Respectfully submitted.

(Signed) S. B. Lawrence."

That the deductions of the complainant were correctly set out in the foregoing document; that proof thereof was filed with the said Tax Commission by said Complainant, all of which was copied in and became part of the record in this cause.

That a certified copy of the record showing all of the proceedings had and done in respect thereto is hereby at-

tached and marked Exhibit "A" as if set forth in words and figures.

That upon the 20th day of December 1930 the Mississippi State Tax Commission wrote a letter to the Complainant in words and figures as follows, to-wit:

"Lester C. Franklin, Commissioner. DeQuency V. Sutton, Deputy Commissioner

Division of Income Tax, Mississippi State Tax Commission, Jackson, Mississippi

Office of the Commissioner, Returns Section

In Replying Refer to It-101/7831, HNE:E/838. (Enclosure.)

Dec. 20, 1930.

[fol. 9] S. B. Lawrence, Esq., c/o Watkins, Watkins & Eager, Attorneys, Jackson, Mississippi.

DEAR SIR: This office wishes to advise you that your appeal from the assessment of additional State Income Tax made against you by this office for the calendar year 1929 in the sum of $2,391.28, having been heard by the State Tax Commission, has been denied.

A certified copy of the Minutes in relation thereto is enclosed.

Respectfully, (Signed) Lester C. Franklin, Commissioner."

That the original of said letter is hereto attached, the same being asked to be considered as if set forth herein in full in words and figures.

Complainant avers that no tax whatever was then and there due and it was unlawful on the part of the Mississippi State Tax Commission to make said additional assessment against Complainant, and it was unlawful on the part of the Mississippi State Tax Commission to deny complainant's petition for a review, but that on the other hand said assessment should have been reviewed as prayed for by Complainant. That said petition for appeal and review before the entire Commission was filed by the Complainant within one year from the date of the notice given to Complainant of the assessment of any additional tax.

Complainant shows unto the court that Section 11, Chapter 132, Mississippi Laws 1924 as amended by Chapter 32, Mississippi Laws 1928 Extraordinary Session, violates the Fourteenth Amendment of the Constitution of the United States in that the same deprives the complainant of his property without due process of law and denies to him the equal protection of the law.

[fol. 10] For all of the reasons hereinbefore set out, which reasons and objections are now re-alleged and averred, complainant alleges and avers the fact to be: That Chapter 32 Mississippi legislature of 1928, extraordinary session, as construed and enforced, violates the fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of his property without due process of law, and denies to him the equal protection of the law; for that, in the imposition of liability for income tax for the year 1929, said act arbitrarily discriminated against this petitioner. The petitioner during the year 1929, was engaged in the business of constructing public roads, streets and highways in the state of Mississippi, Louisiana and Tennessee. That during said years, and during all subsequent years, he was in active competition with domestic corporations organized under the laws of the State of Mississippi, and domiciled therein, which corporations were likewise engaged in the business of building roads, highways and streets in the states of Louisiana, Mississippi and Tennessee, and that there was, during said years prior thereto, and at all times since, a large number of domestic corporations in the state of Mississippi, engaged in carrying on business and transacting business in said three states aforementioned, as well as other states where said domestic corporations had places of manufacture, production and/or places of merchandise.

That under Chapter 32, as aforesaid, this petitioner became and was adjudicated to be liable for taxes on income thus earned and collected out of the state of Mississippi where he maintains a business situs, while all of said domestic corporations aforesaid, engaged in a similar line of business with the petitioner and/or engaged in other lines of commercial and industrial pursuits were not liable to pay a tax on income earned beyond the limits of the State of Mississippi, because no liability was imposed

thereupon under said act; and that such corporations have [fol. 11] not paid said tax to the State of Mississippi: but, upon the other hand, have been, by the Mississippi State Tax Commission, adjudged to be free from liability therefor, and no demand made therefor, but income earned from without the State has been intentionally, continuously and systematically deducted from the gross income of domestic corporations.

Petitioner further shows that there are, having a situs in the State of Mississippi, a large number of foreign corporations, incorporated under the laws of other states in the Union, whose principal place of business is in the State of Mississippi, which corporations are engaged in similar lines of business to that of petitioner, as well as other lines of commerce and industry; that said corporations likewise have places of manufacture production and of merchandise in the State of Louisiana, Arkansas, Tennessee, Alabama and other states than that of their domicile, earn income therein, and no liability is imposed upon them for income thus earned beyond the limits of the State of Mississippi. That thereby an unjust, arbitrary and unwarranted discrimination was created, adjudicated and enforced against this petitioner, by reason of which, said act hereinbefore referred to, violates the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore set out.

That the Legislature of the State of Mississippi is without power and authority to impose and/or collect tax on gains, profits or income derived and earned beyond the limits of the State and that Section 32, Mississippi Legislature, extraordinary Session 1928, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of property without due process of law and denies to him the equal protection of the law thereby.

The petitioner further shows: (1) That in the year 1927, petitioner should have been permitted to deduct from income the sum of $4,965.11, paid to the Federal Government, [fol. 12] and (2) that in the year 1929, petitioner was assessed with income earned and collected wholly without the State of Mississippi, and was not permitted to deduct from

such income the sum of $4,830.14 paid to Federal Government for income tax.

Petitioner shows unto the court that this petition is filed within thirty days from receipt from the Mississippi State Tax Commission of its findings against this petitioner and denying to him the relief prayed for, shown by the record in this case.

Wherefore Petitioner prays that this petition requesting a refund and review of the proceedings of the State Tax Commission may be filed and that such refund and review may be had. That Petitioner files herewith a bond with good and sufficient surety to be approved by the Clerk of this Court in a sum double the amount in controversy conditioned to pay the judgment of the Court.

Complainant prays that the clerk of this Court shall issue notice to the Tax Commission of the filing of said petition and bond, as provided in Section 5057, Mississippi 1930 Code, as aforesaid, and that the State Tax Commission cause the records or the proceedings in that office to be transmitted to this court, and that said court will take jurisdiction to review said proceedings and to render a decree as in equity and good conscience may seem proper. Whereunder and whereby there may be awarded to petitioner a correct and just judgment.

That a judgment may be rendered by this court vacating and setting aside the assessment made against complainant petitioner as prayed for by the petitioner before the Mississippi State Tax Commission.

And if petitioner has not prayed for proper relief the Court will grant such other and general relief as may be just and expedient in the premises.

Watkins, Watkins & Eager, Attorneys for the Petitioner.

[fol. 13] *Duly sworn to by S. B. Lawrence. Jurat omitted in printing.*

[File endorsement omitted.]

EXHIBIT "A" TO PETITION

"Copy." "Copy"

STATE OF MISSISSIPPI,
County of Hinds:

Now comes S. B. Lawrence, a citizen of the State of Misssissippi, and residing in the City of Jackson, who first being duly sworn, deposeth and saith:

That for the year 1929 he had no taxable income earned within the borders of the State of Mississippi.

That in the year 1929 he earned profits in the amount of $50,949.36 wholly within the State of Tennessee; and that such profits were earned in the fulfillment of certain contracts entered into for the construction of roads with political subdivisions of the State of Tennessee, wholly within the State of Tennessee, no part of which was done or performed in the State of Mississippi.

[fol. 14] That for the year 1929 his net income before deducting Income Taxes but after deducting donations was $49,905.67, which included the aforementioned earnings and profits earned in the State of Tennessee from contracts performed in Tennessee.

That for the year 1927 he paid State Income Tax in the amount of $1,977.95, during the year, 1928.

That for the year 1927 he paid Federal Income Tax in the amount of $4,965.11, no part of which was deducted from income in determining the income on which State Income Tax of $1,977.95 was assessed.

That for the year 1929 his Federal Income Tax amounted to $4,830.14, no part of which was deducted in determining the net income of $49,905.67, all of which, as aforesaid was wholly earned and collected without the State of Mississippi and in the State of Tennessee, by virtue of the performance of certain contracts entered into in the said State of Tennessee with political subdivisions of the said State of Tennessee.

All of the foregoing is hereby made a part of the appeal to the Tax Commission.

(Signed) S. B. Lawrence.

Sworn to and subscribed before me this 14th day of November, 1930. (Signed) M. J. Conerly, Notary Public. (Seal.)

[fol. 15] "Copy"

Lester C. Franklin, Commissioner. de Quincy V. Sutton, Deputy Commissioner

Division of Income Tax, Mississippi State Tax Commission, Jackson, Mississippi

Office of the Commissioner, Returns Section

In replying Refer to IT: 101-7831, HNE: E/838. (Enclosure.)

Dec. 20, 1930.

"Copy"

S. B. Lawrence, Esq., % Watkins, Watkins & Eager, Attorneys, Jackson, Mississippi.

DEAR SIR: This office wishes to advise you that your appeal from the assessment of additional State Income Taxes made against you by this office for the calendar year 1929 in the sum of $2,391.28, having been heard by the State Tax Commission, has been denied. A certified copy of the minutes in relation thereto is enclosed.

Respectfully, (Signed) Lester C. Franklin, Commissioner. E.

[fol. 16] "Copy"

BEFORE THE STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, AT THE STATE CAPITOL

In the Matter of the Petition of S. B. LAWRENCE for Revision of Income Tax Assessed

This matter coming on for hearing on this the fourteenth day of November, 1930, at the State Capitol, pursuant to requisite notice, and it appearing that S. B. Lawrence, an individual, residing in Jackson, Hinds County, Mississippi, and doing business as the Lawrence Construction Company, has heretofore been assessed with additional tax for the year 1929, in the sum of $2,288.31 and interest thereon, said assessment having been made by the Chairman of the State Tax Commission, and Commissioner, under the provisions of Chapter 132, Laws of 1924; and it appearing that the

said S. B. Lawrence has heretofore made written application to the Commissioner, as provided by said Chapter, for revision of the said Income Tax so assessed, and that the said petition has been denied by the Commissioner, said application has been made, by the petitioner, for hearing before this Commission, as required by law.

It having been agreed by the taxpayer, S. B. Lawrence, and the Commissioner, that the matter be presented by written brief, and the Commission having before it the brief filed for and on behalf of the said taxpayer, and the returns and statements submitted by the said taxpayer and his accountants; and it appearing that the matter in controversy is the exclusion from the income tax return of the said taxpayer for the year 1929 of certain sums of money earned from contracts alleged to be in interstate commerce, and the deduction by the taxpayer of federal income taxes paid, and the Commission, after carefully reading the brief of the said taxpayer and being fully advised in the premises that all the matters of fact in the said matter, the Commission is of the opinion that the decision of the Commissioner should be approved.

[fol. 17] It is, therefore, ordered and adjudged that the decision of the Commissioner heretofore may be and the same is hereby in all things approved and confirmed, and the petition of the taxpayer herein be denied, and that the same be and is hereby dismissed.

Ordered and adjudged this the fourteenth day of November, 1930.

"Copy-

STATE OF MISSISSIPPI,
County of Hinds:

I, A. S. Coody, Secretary of the State Tax Commission, of the State of Mississippi, do hereby certify that the foregoing is a true, correct and complete copy of an order of the State Tax Commission adopted on the date therein stated as the same appears at page 60, of Minute Book Number 4, as officially recorded in the office of the State Tax Commission.

Witness my official seal and signature this the 20th day of November, 1930.

(Signed) A. S. Coody, Secretary State Tax Commission. (Seal.)

[fol. 18] IN CHANCERY COURT OF HINDS COUNTY

[Title omitted]

DEMURRER—Filed Feb. 13, 1931

Now comes Mississippi, State Tax Commission, Lester C. Franklin, Chairman of Mississippi State Tax Commission, Webb Walley and H. H. Casteel, members of said State Tax Commission, and A. S. Coody, Secretary of said State Tax Commission, respondents in the above entitled and numbered cause, and demurs to the petition for review exhibited against them by S. B. Lawrence, petitioner, for the following causes of demurrer, to-wit:

1. There is no equity on the face of said petition.

2. The petition affirmatively shows that the petitioner is legally and equitably required to pay the amount of income taxes to the State of Missisippi assessed against him as shown by the allegations of said petition and the exhibits thereto.

3. The petition affirmatively shows on its face that the income tax laws of the State of Mississippi, in so far as this petitioner is concerned, are legal, valid and binding upon him and are not violative of or repugnant to any of the provisions or the spirit of the Constitution of the State of Mississippi or the Constitution of the United States of America.

4. The petition shows on its face that the state has levied, and can legally levy, an income tax on a resident citizen's [fol. 19] income derived entirely outside of the State.

5. The petition shows on its face that this petitioner may not complain that an exemption is granted to foreign and domestic corporations from paying income taxes to the State of Mississippi on income derived wholly outside of said State.

6. The petition shows on its face that the petitioner here may not complain that the state has allowed three years to itself in which to re-calculate any income taxes he may owe and that said petitioner has only one year for application for refund of any erroneously paid income tax.

7. The petition shows on its face that the State of Mississippi is not required to allow any deduction from taxable income of the amount accrued or paid during the taxable year for Federal Income Taxes levied under the authority of the United States Government.

And for other causes to be made known upon this hearing.

Geo. T. Mitchell, Attorney General of Mississippi,
by Forrest B. Jackson, Solicitors for Respondents.

I, Forrest B. Jackson, Assistant Attorney General, one of solicitors for respondents, hereby certify that I believe the foregoing demurrer ought to be sustained.

Forrest B. Jackson.

[File endorsement omitted.]

[fol. 20] In Chancery Court of Hinds County, First Judicial District, January Term, 1931

No. 18865

S. B. Lawrence, Petitioner,

v.

State Tax Commission et al., Respondents

Final Decree—Filed Feb. 23, 1931

This cause comong in this day for hearing on petition of S. B. Lawrence, in pursuance of the provisions of Section 50 57, Mississippi Annotated Code, 1930, for a review of the final action of the Mississippi State Tax Commission assessing and making final an assessment of income taxes in the sum of $2,288.31, with 6% interest thereon from October 29, 1930, until paid, and demurrer of defendants, State Tax Commission, Lester C. Franklin, Chairman, and Webb Walley and H. H. Casteel, members, and A. S. Coody, Secretary, and the Court having heard the presentation of the petition and the demurrer, argument and suggestions for counsel for all parties, who were then present in person and by counsel, and the court being fully advised in the

premises, and having considered the same, if of the opinion that the demurrer should be and the same is hereby sustained.

It is therefore ordered, adjudged and decreed that the demurrer to the petition be and the same is hereby sustained, and counsel for petitioner having announced in open court that petitioner declined to plead further, the petition is hereby dismissed and the petitioner denied any of the relief therein sought.

It is further ordered, adjudged and decreed that the State of Mississippi hereby recovers of and from S. B. Lawrence, Petitioner, and sureties on his bond, the sum of $2,288.31, income taxes for the year 1929, *for the year 1929*, together with interest at 6% per annum thereon from October 29th, [fols. 21 & 22] 1930, until paid, together with all costs herein expended, for which let execution issue.

It is further ordered, adjudged and decreed that the said S. B. Lawrence, petitioner, is hereby granted an appeal, with supersedeas, to the Supreme Court of Mississippi, as by law provided in such cases, upon his entering into a good and sufficient appeal bond in the sum of Five Thousand ($5,000.00) Dollars to be approved by the Chancery Clerk.

Ordered, adjudged and decreed, this the 23rd day of February, 1931.

V. J. Stricker, Chancellor.

O. K. as to form. W. H. Watkins.

[File endorsement omitted.]

Bond on appeal for $5,000, approved February 23, 1931, omitted in printing.

[fol. 23] Bond on appeal for $6,000, approved and filed January 10, 1931, omitted in printing.

[fol. 24] IN SUPREME COURT OF MISSISSIPPI

No. 29464

S. B. LAWRENCE ET AL.

v.

STATE TAX COMMISSION ET AL.

ASSIGNMENTS OF ERROR—Filed April 13, 1931

Comes S. B. Lawrence and Fidelity & Deposit Company of Maryland, appellants, by attorneys, and complain of error comcitted in a certain decree rendered by V. J. Stricker, chancellor, on the 23rd day of February, 1931, adversely to them, and assign the following error:

1. The court below committed error in sustaining a demurrer and dismissing appellants' petition for review filed in said cause.

2. The court below committed error in rendering a judgment against appellants therein for the taxes involved.

3. The court below committed error in not granting the relief prayed for in the petition for review filed on behalf of the said S. B. Lawrence.

4. The court below committed error in holding that income arising out of contract executed beyond the limits of the state of Mississippi, and wholly and totally performed beyond the limits of the State of Mississippi, was subject to income tax under the laws of the State of Mississippi.

5. The court below committed error in holding that section 11, chapter 132, Mississippi laws 1924, as amended by chapter 32, Mississippi laws 1928, extraordinary session, did not violate the 14th amendment to the Constitution of the United States, in that the same deprived the said S. B. [fol. 25] Lawrence of his property without due process of law and denied to him the equal protection of the law.

6. The court below committed error in holding that section 11, chapter 132, Mississippi laws 1924, as amended by chapter 32, Mississippi laws 1928, extraordinary session, was valid against the objections of the appellants that the

same violated the 14th amendment to the Constitution of the United States in that said section of said laws, as construed and enforced by the court below deprived these appellants of their property without due process of law, and denied to them the equal protection of the law.

7. The court below committed error in enforcing against these appellants section 11, chapter 132, Mississippi laws 1924, as amended by chapter 32, Mississippi laws 1928, extraordinary session, for that said chapter, as construed and enforced in this case, violated the 14th amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law, and denied to them the equal protection of the law..

8. Chapter 32, Mississippi laws, 1928, extraordinary session, as construed and enforced in this case against the appellants, violated section 112 and section 181 of the Constitution of the State of Mississippi.

9. The court below committed error in failing and refusing to permit the said S. B. Lawrence to deduct from income earned the sum of $4,965.11 paid to the United States government federal income tax; such action upon the part [fol. 26] of the court violated the Constitution of the United States and the acts of Congress, in that the enforcement of such tax imposed liability upon instrumentalities of the United States Government.

10. The court below committed error in failing and refusing to overrule the appellee's demurrer to the petition for review filed by the said S. B. Lawrence.

11. The construction of chapter 32, Mississippi laws 1928, extraordinary session, and the enforcement thereof against the appellants, under the facts shown in this record, caused said chapter 32, and each and every section and paragraph thereof, to violate the 14th amendment to the Constitution of the United States, in that the enforcement of such chapter against the appellants in this case deprived them, and each of them, of their property without due process of law, and denied to them the equal protection of the law and also caused said chapter, and each and every section and paragraph thereof, to violate section 112 and section 181 of the Constitution of the State of Mississippi,

which requires uniformity of taxation, and also requires corporations and individuals to be taxed in the same manner, by reason of which the court below committed error.

12. Other causes to be assigned at the hearing.

Stevens & Heidelberg, Watkins, Watkins & Eager,
Attorneys for the Appellants.

I, William H. Watkins, of counsel for the appellants in the above entitled cause, certify that I have this day mailed to the Hon. George T. Mitchell, Attorney General of the [fol. 27] State of Mississippi, a true and correct copy of the foregoing assignment of error by United States mail, postage prepaid, at Jackson, Mississippi.

Dated April 11, 1931.

W. H. Watkins.

[File endorsement omitted.]

[fol. 28] IN SUPREME COURT OF MISSISSIPPI

No. 29464

S. B. LAWRENCE

vs.

STATE TAX COMMISSION

JUDGMENT—Nov. 9, 1931

This cause having been submitted at a former day of this term on the record herein from the Chancery Court of Hinds County, and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein, it is therefore ordered, adjudged and decreed that the Decree rendered therein on the 23rd day of February, 1931, be, and the same is hereby affirmed. It is therefore ordered, adjudged and decreed that The State of Mississippi, do have and recover of and from the appellant, S. B. Lawrence, and the Maryland Casualty Company, surety on the appeal bond herein, the sum of $2,288.31 with interest thereon at the rate of 6% per annum from October

29th, 1930, to February 23rd, 1931 amounting to $57.20 making a total of $2345.51, the amount of the decree in the court below, together with interest thereon at the rate of 6% per annum from February 23rd, 1931, until paid, and also the further sum of $117.27, being 5 per centum damages as allowed by statute, and all costs of court below and of this appeal to be taxed etc.

[fol. 29] IN SUPREME COURT OF MISSISSIPPI. EN BANC

29464

S. B. LAWRENCE et al.

vs.

MISSISSIPPI STATE TAX COMMISSION

OPINION

ETHRIDGE, J.:

S. B. Lawrence, the appellant, is a resident of Hinds County, Mississippi, engaged in constructing and maintaining public roads and highways in the State of Mississippi and in other states. In the year 1929 he went into the state of Tennessee, entered into and completed contracts for the construction of certain highways, which contracts were entered into and entirely completed in the state of Tennessee. He collected from that state the money accruing to him by reason of the performance of said contracts. His net income was such that, if his income, earned and collected entirely beyond the limits of the State of Mississippi, in the State of Tennessee, were subjects to taxation he would be owing the State of Mississippi the sum of $2,288.31.

The Mississippi State Tax Commission, in accordance with the provisions of the Mississippi statutes on the subject, took steps to assess him with the income tax imposed by law. The appellant appeared before the State Tax Commission and objected to the assessment of the said income tax, contending that he is not subject to the income tax upon money earned outside of the state of Mississippi in the contract above referred to; that the state could not, under the

14th section of the bill of rights of the State of Mississippi, or the 14th amendment to the constitution of the United States, impose liability for income earned as result of performing labor or pursuing an occupation beyond the limits of the state, and in the limits of another state.

[fol. 30] On the hearing the Tax Commission assessed him with an income tax, on the income earned out of the state. The appellant thereupon filed a bill in chancery in accordance with Section 5057, Code of 1930, to review the assessment. He contended that Chapter 32 Extraordinary Session Mississippi Legislature 1928 did not impose liability for income earned wholly out of the state of Mississippi; that if the statute should be so construed and enforced as to impose liability upon him for such income then the statute would violate the above sections of the constitution. It was alleged that Section 11, Chapter 132, Laws of 1924, as amended by Chapter 32, Laws of 1928 Extraordinary Session, violates the above sections of the constitution because it does not apply to incomes earned by domestic corporations wholly outside of the State of Mississippi. We quote from complainant as follows:

"Complainant alleges and avers the fact to be: "That Chapter 32, Mississippi legislature of 1928, Extraordinary Session, as construed and enforced, violates the fourteenth amendment to the constitution of the United States in that the same deprives the petitioner of his property without due process of law, and denies to him the equal protection of the law; for that, in the imposition of liability for income tax for the year 1929, said act arbitrarily discriminated against this petitioner. The petitioner during the year 1929, was engaged in the business of constructing public roads, streets and highways in the state of Mississippi, Louisiana and Tennessee. That during said years, and during all subsequent years, he was in active competition with domestic corporations organized under the laws of the State of Mississippi, and domiciled therein, which corporations were likewise engaged in the business of building roads, highways and streets in the states of Louisiana, Mississippi and Tennessee, and that there was during said years, prior thereto, and at all times since, a large number of domestic corporations in the State of Mis-
[fol. 31] sissippi, engaged in carrying on business and

transacting business in said three states aforementioned, as well as other states where said domestic corporations had places of manufacture, production and/or places of merchandise."

He further alleges that other such domestic corporations were not assessed with or held to be liable to an income tax earned beyond the limits of the state of Mississippi by such domestic corporations, and that such corporations have not paid such taxes to the state of Mississippi but have been adjudged by the Mississippi State Tax Commission to be free from liability therefor, and that no demand had been made therefor, but that such income earned from without the State has been intentionally, continuously and systematically deducted from the gross income of domestic corporations.

It will be seen from an examination of Chapter 32, Laws of State of Mississippi, Extraordinary Session of 1928, amending section 11 of Chapter 132, Laws of 1924, that for the purpose of this act, except as otherwise provided for nonresidents, the term gross income does not include income of a domestic corporation when earned from sources outside this state, and such sources shall be defined to mean all manufacture or production and places of merchandising.

The chancery court held the appellant liable for the tax and rendered judgment against him, from which this appeal is prosecuted.

If the Chapter 32 of Laws of State of Mississippi, Extraordinary Session 1928, is constitutional, of course the appellant is subject to the tax; if such act is unconstitutional then Section 11 of Chapter 132, Laws of 1924, would remain in force as though the amendment had not been made, and under the said chapter both individuals and domestic corporations would be subject to income tax on the income earned outside of the state as well as income earned within the state. State v. G. M. & N. R. R. Co. 13[illegible] Miss., 70, 104 So., 689, and authorities therein cited. It is therefore unnecessary to decide whether Chapter 32, Laws [fol. 32] of Mississippi, Extraordinary Session 1928, is constitutional or not, because from either viewpoint the same conclusion and judgment would be reached—that is to say—in taking either view the appellant would be liable

for the tax. See Miller, Tax Collector, vs. C. & G. Ry. Co., 154 Miss., 317, 122 So., 366, at page 324 of the Mississippi Report where the court said:

"In event a railroad discriminated against by this statute should challenge the validity thereof on the ground that it is arbitrarily discriminated against, it would not be necessary for the court to decide the question, for so to do would profit the complaining railroad nothing; for, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complainant railroad's tax would be three hundred fifty dollars per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow."

See also Moore v. Tunica County, 143 Miss., 821, 107 So., 659; Claiborne County v. Moorehead, 145 Miss. 867, 111 So., 372; Buford v. State, 146 Miss., 66, 111 So. 850; Miller v. Tucker, 142 Miss., 146; 105 So. 774; Pearl River County v. Lacy Lumber Company, 124 Miss. 85, 86 So. 755; Adams v. Standard Oil Co. of Ky., 97 Miss., 879, 53 So. 692; American Express Co. v. Beer, 107 Miss., 528, 65 So. 575, L. R. A. 1918 E. 446, Ann. Cas. 1916 D 127.

The judgment of the court below must therefore be affirmed.

Affirmed.

[Vol. 33] IN SUPREME COURT OF MISSISSIPPI. IN BANC

29464

S. B. LAWRENCE et al.

vs.

STATE TAX COMMISSIONER

DISSENTING OPINION

GRIFFITH, J., Dissenting:

The primary point involved in this case may be briefly stated: The income tax laws of the State impose upon a resident natural person a tax upon his income whether

earned within or without the State, and at the same time excludes from the income tax of a domestic corporation all income produced beyond the borders of the State; and the question is whether thereby a discriminatory tax is levied against a resident natural person in respect to his said outside income.

The formula, which has been respected over and over, by which to determine the validity vel non of making a tax-taking difference between those subject thereto and of a classification for that difference, is that the difference or classification "must be reasonable, not arbitrary"; and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989; Lowry v. Clarksdale, 154 Miss., 155, 170. That a greater burden cannot be laid on an individual than upon a domestic corporation, similarly situated in respect to the burden so imposed, would seem obvious, and it has been expressly so held in Frost v. Corporation Commission, 278 U. S. 515, 74 L. Ed., 483, as well as other cases, state and federal.

As said in Crescent Mfg. Co., v. Tax Commission, 129 S. C. 480, 485; "The income tax is primarily a subjective tax imposing personal liability upon the recipient of the [fol. 34] income. It proceeds fundamentally upon the theory that all residents and citizens of the State, whether natural persons or domestic corporation-, should contribute to the public treasury in proportion to ability to pay, measured by the amount of income from all sources". But our law, disregarding that fundamental theory, enacts that although the domestic corporation has an equal ability to pay out of its income derived from without the state as compared to a resident natural person deriving exactly the same income and in exactly the same business from without the state, the domestic corporation is relieved of the tax on that outside income, while resident natural person must pay on identically that same thing. It had as well be said that an individual shall pay while a partnership shall be exempt, or that those who occupy, and conduct their operations in, wooden buildings shall pay while those who conduct their business in brick or stone buildings shall be exempt.

But it seems to me to be unnecessary to pursue the discussion of a proposition which reveals its discriminatory character upon its very face and as plainly so as any argument or review at length would disclose. The majority opinion does not undertake to intimate or hold to the contrary. It simply declines to decide the question and asserts as a justification therefor that even if the discrimination in fact exists this would not aid appellant, the resident natural person, for the reason that the discriminatory exemption, so called, in favor of the domestic corporation would be void and might be stricken from the law, thereby leaving that portion of the laws, which taxes the individual to stand; and to sustain its position the majority cites a number of cases decided by this court, not one of which upon its facts goes, as I submit, to the deeper question which is here before the court.

[fol. 35] The larger number of the cases cited by the majority will be found to be cases dealing with amendments which within themselves are void and this without regard to the original law which is sought to be amended. These cases, of course, have no pertinent application here as will be later herein mentioned. The two or three other cases cited by the majority will be found to fall upon an analysis of their facts, within two well recognized rules which nobody disputes; first, it is a well recognized rule that if the objectionable parts of a statute are separable, no matter of legislative intent, from the remainder thereof, the objectionable part may be stricken out and the statute will be enforced in those parts that are constitutional. There are many cases where the same statute, or statutes amendatory, although dealing with the same general subject, deal also with substantially separate divisions or items under that general subject, these separate divisions or items having no constitutional or other essential connection one with another, in which cases the objectionable items may be eliminated and the remainder enforced. And, second, where the objectionable portion is of such inferior or minor importance in relation to the dominent purpose and scope of the statute, that it can be safely assumed that the legislature would have passed the statute omitting the objectionable portion, then the court can accomplish that pur-

pose by striking out the objectionable minor or inferior portion. This is pointed out in Adams v. Standard Oil Co., 97 Miss., 879, 907. Those principles are summerized in Cooley's Const. Lim. (8th Ed.) P. 364 as follows: "When a part of a statute is unconstitutional, that fact does not compel the court to declare the remainder void, unless the unconstitutional part is of such import that the other parts of the statute, if sustained without it, would cause results not contemplated or desired by the legislature. The question to be determined is whether the obnoxious part is an inducement to the whole act or whether it is a mere incident thereto."

[fol. 36] But here we have, not two substantially separate divisions of items under the same general subject, but what is substantially one item or division, namely, the item of the income tax earned beyond the limits of the state, and the point is that this one item or division is made to bear differently on two different taxpayers, who in respect to the object of the legislation are similarly situated. Because this item is made thus to bear differently on those similarly situated, it cannot for that reason be said that this makes different items of them, for if this were true every case of discrimination could be evaded of relief by a similar mode of construction and the constitutional guaranty of equal protection would be, as to tax matters, reduced to a mere scrap of paper. And even if the conception could be entertained that because the item is made to bear differently upon different taxpayers, although similarly situated, there thus arises in a sense two separate items, this does not aid the question here, because as to that question the two have here, in a constitutional sense, an inseparable connection each with the other, for the fact is that it is the inescapable attrition of one upon the other that produces or gives rise to the very constitutional question we have here in hand.

Nor can it be said that the provision with reference to domestic corporation- is a mere incidental, or minor or inferior feature of the enactment as compared with the provision imposing the tax on a resident natural person. On the contrary there is the more reason to believe—in view of the fact that to impose the tax on domestic corporation- on outside incomes would drive many if not most of the larger of the domestic corporations to go to other states, to

the great loss of the treasury of the state—that the legislature, when this matter was brought to their attention in 1928, would probably have enacted the amendment of 1928 excluding the outside incomes of domestic corporations and at the same time would have excluded also the outside incomes of residental natural persons if at the time the inad- [fol. 37] missibility of any discrimination in this matter had been known to the legislature. Whether, if they had so known, they would have enacted that all incomes produced outside of the state would be excluded, or, on the other hand, they would have included such outside incomes both as to resident natural persons and domestic corporations, the court has no means of determining, and unless the court can so determine, there is no legitimate power in the court to strike out that which is the last deliberate expression of the legislative will on the subject. Com. v. Hanna, 195 Mass. 262, 122 Am. St. 251, 11 Ann. Cas. 514, 11 L. R. A. (N. S.) 799, and see the text and the numerous cases noted in 6 R. C. L. pp. 121-130.

The true role is tersely stated in Howard v. Illinois Cent. R. Co., 207 U. S. 463, 52 L. ed. 297, 310, as follows: "Even in a case where legal provisions may be severed from those which are illegal in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provision eliminated." Or as was said, in Pollock v. Farmer's L. & T. Co., 158 U. S. 601, 39 L. ed. 1108, 1125, wherein it was urged that an unconstitutional exception in a statute should be disregarded:

"The insuperable difficulty with the application of that principle to the present instance is that * * * it would confer upon the statute a positive operation beyond the legislative intent and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

And no occasion has more strikingly illustrated the principle for which I am contending than the notable case involving the grandfather amendment to the Oklahoma constitution prescribing a literacy test for electors but further provising that persons who on January 1st, 1866 were entitled to vote and the lineal descendants of those persons should not be subject to the test. The court in holding that

the proviso was discriminatory and rested upon no sustain-
[fol. 38] able differentisting reason was urged to disregard the proviso by striking it out, and thereby allow the literacy test to stand without the proviso, but the court refused to take that course for the reason that it could not be said whether, if the proviso were eliminated, the literacy test as thus exercised would have been enacted, and therefore the court struck down the literacy test itself. So exactly in this case,—instead of an intimation that the particular provision excluding the outside incomes of domestic corporations might be stricken down the entire item of the law in respect to incomes earned outside the state should be stricken—so far as those outside incomes are concerned, whether earned by individuals or corporations. See also Connelly v. Union Co., 184 U. S. 540, 46 L. ed. 679, 692.

This latter brings the more distinctly into view this further inescapable inquiry: If the provisions mentioned are severable so as to become two provisions, which is it of the two conflicting provisions in this case that is the objectionable portion? Admittedly the legislature had the power to enact that the income of a domestic corporation produced outside of the state should not be taxable in this state, so that clearly that enactment is not unconstitutional within itself. Now then is that enactment to be said to be objectionable so as to be stricken down? It is said that it is objectionable and may be stricken because by its existence there is caused a discrimination against a resident natural person, who by the requirement of the income tax law is taxed as to his income produced outside of the state. But it is not this latter portion, which imposes the discriminatory tax, that is the objectionable portion? This latter is the active agent that is seeking to impose the discriminatory tax and is therefore the offending portion, not the portion which does not seek to impose the tax and is thus wholly inactive and inoffensive.

[fol. 39] And, as against the views which I am endeavoring to maintain, nothing is gained by the argument that because the original income tax law of 1924 taxed the outside incomes of both of resident natural persons and of domestic corporations, and because it is the amendment of 1928 to that law which excludes the outside incomes of domestic corporations, and which has produced the dis-

crimination herein complained of, thereby importing into the statute an unconstitutional question, therefore the amendment is the particular element that must be stricken and this without regard to the validity of the amendment within itself and without regard to the importings of the amendment as related or as compared to that with which it comes into conflict. Certainly, it is the rule that a valid statute cannot be amended by an unconstitutional amendment, when the amendment within itself is unconstitutional, as was the case, for instance in Buford v. State, 146 Miss. 66, Moore v. Tunica County, 143 Miss. 829, and in most of the others cited by the majority. In such cases the amendment falls of its own weight, not because of its constitutional relation with other provisions of the statute amended. But I repeat that the amendment here is entirely constitutional within itself, and when its confiict with the provision taxing outside incomes of resident natural persons comes into review on the question which of the two must go down, then it is a further question of legislative intention, and this reduces it to the further question as to the relative or comparative importance of the one provision against the other, and unless the provision brought in by the amendment is of such inferior importance, as compared with the particular remaining provision with which it comes into conflict, that the court can see and can say that the legislature, if it had at the time known of the inadmissibility of the conflict on constitutional grounds, would not have enacted the amendment, then the court has [fol. 40] no authority to strike the amendment down, nor adjudicate the case in hand upon any hypothesis that it may simply be disregarded.

When an amendment is made to a statute, it is as much a part thereof as if originally written therein, and the entire statute is brought forward as if re-enacted in its entirety on the date of the passage of the amendment. Suppose the amendment here enacted that no incomes produced outside of the state by those engaged in agriculture, in horticulture, in manufacturing, in mercantile pursuits whether wholesale or retail, in lumbering, in road-building and in transportation, should be included in their income tax returns, thereby excluding ninety per cent of those in the state who earn any income outside of the state, would the court say that because of the discrimination against the

ten per cent who do not come within the excluded classes, the whole amendment must be stricken, and all incomes derived beyond the state should be taxable, in clear contravention of the preponderant legislative intent as expressed on the subject at the time of its reconsideration when the amendment was enacted. This question answers itself. The court has no legitimate legislative powers, and cannot convert itself into a legislative body and produce as statutory law by judicial decision that which the legislature would not or probably would not at the time have allowed: and thus is demonstrated that it is not the mere technical fact that the matter is contained in an amendment valid in itself, but the controlling issue is as to the relative importance of the matter made a part of the statute by the amendment, and as to what the legislature would have done at the time if the inadmissibility of the discrimination had been in mind. Certainly, in this respect and in every respect, germane to the question here before us, amendments stand upon equal if not upon higher ground than do exceptions or provisos, as to which latter, direct and controlling authorities upon the exact point have already been cited. See also Lewis' Sutherland Statutory Construction, (2nd Ed) Secs. 305, 306.

[fol. 41] But I will not further elaborate upon the discussion; I desire, having outlined the grounds which are regarded by me controlling here, only to add the following observations touching the attitude in which the court is left by the result reached by the judgment of the majority opinion, which as I submit, has been merely to scratch the surface—has been to float down the stream of least resistance, and has been not to face the question before us.

Now in what attitude exactly does the majority opinion place this court in respect to a mandatory provision of the supreme law of the land that "no state shall enforce any law which shall deny to any person within its jurisdiction the equal protection of laws?" That the laws of this state in the respect mentioned do deny to appellant the equal protection of the law is clear, and as already stated the majority opinion does not undertake to assert to the contrary. But here is the court's exact attitude: If the state tax collector or the attorney general were to sue domestic corporations for their outside income taxes on the ground that the income tax law as amended makes an unconstitu-

tional discrimination in favor of domestic corporations, and that for that reason the exclusion of the outside income of domestic corporations is void, the court would answer him as was recently held by the Supreme Court of the United States in Columbus & G. Ry. Co. v. Miller, 51 S. Ct. 392, a case appealed from this court, that "the constitutional guaranty does not extend to the mere interest of an official, as such, who has not been * * * denied the equal protection of the laws" and his suit would be dismissed without deciding the merits of the question; and now when on the other hand, the individual who is discriminated against appeals to the court the answer returned to him is that the court will still not decide the merits of the question for if the law be discriminatory, it is not void as to him whatever it might be as to domestic [fol. 42] corporations, so that he has no sustainable complaint; and thus by whatever door the court is approached the court declines to act; and the discrimination goes on from year to year and the constitution continues to be violated, and will be in the future as in the past. When the state is proceeding to the enforcement of a law which denies to any person within its jurisdiction the equal protection of the laws, it is upon the court, when appealed to, that the power and mandatory constitutional duty is imposed, to prevent the enforcement of that law in so far as it effectuates the obnoxious discrimination; but, with deference, the course of the court here is to the opposite effect, and is in substance, by its non-action to sanction the unconstitutional discrimination and continued enforcement thereof. Thus viewing the matter in its ultimate effect, I must in response to my sense of constitutional obligation respectfully decline to join in the course now taken by the court, and must avail of the privilege to record my dissent.

Judge McGowen joins in this dissent.

[fol. 43] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR APPEAL—Filed Dec. 8, 1931

To the Honorable Sydney Smith, Chief Justice of the State of Mississippi and presiding judge thereof:

Your petitioners, S. B. Lawrence, an adult resident of Jackson, and the Fidelity & Deposit Company of Maryland,

a corporation organized under the laws of the State of Maryland, and domiciled at Baltimore in said state, appellants in said cause, and the Maryland Casualty Company, surety on their appeal bond to the Supreme Court of the State of Mississippi, in the above-entitled cause, in this, their petition for an appeal from the final judgment rendered against petitioners by the Supreme Court of the State of Mississippi to the Supreme Court of the United States, respectfully show unto the Court that upon the 23rd day of February, 1931, a judgment was rendered in the above-entitled cause against S. B. Lawrence and the Fidelity & Deposit Company of Maryland, his surety, by the Chancery Court of the First Judicial District of Hinds County, Mississippi, in favor of the State of Mississippi. That the petitioner, S. B. Lawrence, and the Fidelity & Deposit Company of Maryland prosecuted an appeal from said judgment rendered in the Chancery Court of the First Judicial District of Hinds County, Mississippi, as aforesaid, to the Supreme Court of the State of Mississippi, and the Maryland Casualty Company became surety on their appeal bond. That upon the 9th day of November, 1931, the judgment and decree rendered by the Chancery Court of the First Judicial District of Hinds County, Mississippi, against S. B. Lawrence and the Fidelity & Deposit Company of Maryland, as aforesaid, was affirmed, and final judgment was entered upon said date against S. B. Lawrence, the Fidelity & Deposit Company of Maryland and the Maryland Casualty Company, surety, for said judgment, with interest, costs and damages. That said judg-
[fol. 44] ment rendered by the Supreme Court of the State of Mississippi against the petitioner is now a final judgment of the Supreme Court of the State of Mississippi, and that the said Supreme Court of the State of Mississippi is the highest court in said state in which a decision in said cause may be rendered; that the Supreme Court of the State of Mississippi is the highest court of appellate jurisdiction in the State of Mississippi.

Petitioners show unto the Court that in said suit there was brought in question Section II, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, as being in conflict with and in violation of Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, in

that appellants S. B. Lawernce and the Fidelity & Deposit Company of Maryland claimed, alleged and asserted that said Section II, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, as enforced and construed in this case, violated said Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, in that said statute deprived the said appellants of their property without due process of law and denied to them the equal protection of the law. That said Section II, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, is in words and figures as follows, to-wit:

"An Act Amending Section II of Chapter 132, Laws of 1924, so as to Exclude from Gross Income Earnings of Domestic Corporations When the Same are Earned Without This State

"Section I. Be it enacted by the legislature of the State of Mississippi, that section II, chapter 132, laws of 1924, be and the same hereby is amended so as to read as follows:

"Section II. That for the purposes of this act, except as otherwise provided for non-residents, the term gross income—

"(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out [fol. 45] of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit or gains, or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five percentum or less, the income may be included for taxation in that portion of any installment payment

representing gain or profit in the year in which payment is received.

"(b) The term gross income, does not include the following items which shall be exempt from taxation under this act:

"(1) The proceeds of life insurance policies and contracts paid upon the death of the insured.

"(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract.

"(3) The value of property acquired by gift, bequest, devise or descent, but the income from such property shall be included in the gross income.

"(4) Interest upon the obligations of the United States or its possessions or securities issued under the provisions of the federal farm loan act of July 17, 1916, or bonds issued by the war finance corporation, or the obligations of the State of Mississippi or political subdivisions thereof or of any municipal corporation.

"(5) The amounts received through accident or health insurance as compensation for personal injuries or sickness, plus the amount of any damages received for such injuries or such sickness or injury, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

"(6) Salaries, wages and other compensation received from the United States Government or officials or employees thereof, including persons in the military or naval forces of the United States.

[fol. 46] "(7) Income received by any religious denomination or by any institution or trust for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes, if such income be used exclusively for carrying out one or more of such purposes.

"(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay a tax pursuant to this act, or dividends from a national bank or state bank organized under the laws of the State of Mississippi.

"(9) In the case of taxpayers other than residents, gross income includes gross income from sources within this state.

"(10) In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policy-holder as is paid back or credited to or treated as an abatement of premium of such policy-holder within the taxable year.

"(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising.

"Sec. 2. That this act take effect and be in force from and after the first day of January, 1928.

"Approved December 1, 1928."

The decision of the said Supreme Court of the State of Mississippi in its said judgment, heretofore referred to and entered upon the 9th day of November, 1931, was in favor of the validity of the said statute of the State of Mississippi hereinbefore referred to, and the Supreme Court of the State of Mississippi, by its said judgment applied and enforced the said statute against the petitioners, and each of them, in said final judgment over the claim and assertion of petitioners that said statute of the State of Mississippi hereinbefore set out, as construed and applied, violated Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, as hereinbefore set out.

[fol. 47] Petitioners show unto the Court that in the rendition of said final judgment against said petitioners, certain errors were committed to the prejudice of your petitioners, all of which in detail appear in the assignment of errors herewith filed in this cause.

Wherefore your petitioners feeling aggrieved by the final decision and judgment of the Supreme Court of the State of Mississippi hereinbefore set forth, pray for the allow-

ance of an appeal from the judgment of the Supreme Court of the State of Mississippi, with supersedeas as now allowed by law for the correction therein of the errors complained of. And your petitioners present herewith an assignment of errors to be presented for argument in the Supreme Court of the United States, and petitioners tender herewith their formal and duly executed bond with good and sufficient sureties joining in the execution of said bond, said bond being conditioned according to law. Your petitioners pray the approval of said bond and that transcript of the pleas and proceedings therein duly authenticated may be forthwith, in accordance with law, sent to the Supreme Court of the United States. Notice hereof has been duly served upon the attorneys of record for the appellees herein. As in duty bound, your petitioners will ever pray.

This the 8th day of December, 1931.

S. B. Lawrence, Fidelity and Deposit Co. of Md., Maryland Casualty Co., by Watkins & Watkins, Eager, Attorneys for Petitioners.

Notice for the foregoing petition for appeal acknowledged and service waived, this 8 day of December, 1931.

George T. Mitchell, Attorney General of the State of Mississippi, by Walter A. Smith, Jr., Attorneys for Appellees.

[fol. 47½] [File endorsement omitted.]

[fols. 48 & 49] Bond on appeal for $6,000, approved December 8, 1931, omitted in printing.

[fol. 50] IN SUPREME COURT OF MISSISSIPPI

No. 29464

S. B. LAWRENCE et al.

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI et al.

ORDER ALLOWING APPEAL AND APPROVING BOND—Filed Dec. 8, 1931

The above-entitled matter, coming on for hearing upon the petition of S. B. Lawrence, the Fidelity & Deposit Com-

pany of Maryland and the Maryland Casualty Company, petitioners for an appeal from the final judgment of the Supreme Court of the State of Mississippi in said cause, and upon examination of the said petition and the record in said matter, and desiring to give the petitioners opportunity to present in the Supreme Court of the United States the questions presented by the record in the said matter; therefore, it is ordered that an appeal with supersedeas from the judgment of the Supreme Court of the State of Mississippi be and is hereby allowed petitioners as allowed by law, and that the appeal bond presented by the said petitioners for Six Thousand Dollars ($6000.00), be and the same is hereby approved.

This the 8th day of December, 1931.

Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

[File endorsement omitted.]

[fol. 51] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENTS OF ERROR—Filed December 8, 1931

Plaintiffs in error, S. B. Lawrence, and the Fidelity & Deposit Company of Maryland and the Maryland Casualty Company, corporations organized under the laws of the State of Maryland, and domiciled at Baltimore in said state, sureties upon the bonds of the said S. B. Lawrence, would show unto the court in this assignment of error that there was manifest error, prejudicial to them, apparent of record in the proceedings, decision and final judgment in the Supreme Court of the State of Mississippi in the above-entitled cause, in this, to-wit:

(1) The Supreme Court of the State of Mississippi committed error in affirming the judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, appealed from, and in rendering final judgment against plaintiffs in error upon the 9th day of November, 1931, in the above entitled cause.

(2) The Supreme Court of the State of Mississippi committed error in failing and refusing to render a judgment reversing the judgment rendered against S. B. Lawrence and the Fidelity & Deposit Company of Maryland appealed from, and in failing and refusing to render a judgment in the Supreme Court of the State of Mississippi in favor of the said S. B. Lawrence and his said sureties and dismissing said suit.

(3) The Supreme Court of the State of Mississippi committed error in holding that Section 11, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, was valid over and against the objections of plaintiffs in error that said statute, as applied and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived plaintiffs in error of their property without due process of law and denied to them the equal protection of the law.

(4) The Supreme Court of the State of Mississippi committed error in holding that Section 11, Chapter 132, Missis-
[fol. 52] sippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, did not violate the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the said plaintiffs of their property without due process of law and denied to them the equal protection of the law.

(5) The Supreme Court of the State of Mississippi committed error in holding that S. B. Lawrence, as well as the sureties upon his respective appeal bonds were liable for income contracted for, and earned and collected exclusively beyond the limits of the State of Mississippi in the State of Tennessee, by reason of which error and the enforcement of Chapter 32, Mississippi Laws of 1928, extraordinary session, hereinbefore referred to, said judgment violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived plaintiffs in error of their property without due process of law and denied to them the equal protection of the law.

(6) The Supreme Court of the State of Mississippi committed error in holding that the Mississippi law of 1924,

amended by Chapter 32 of *of* the Mississippi laws of 1928, hereinbefore referred to, justified the imposition of liability upon plaintiff in error S. B. Lawrence and the respective sureties upon his several appeal bonds by reason of the matters and things appearing in this record.

(7) For other reasons apparent.

S. B. Lawrence, Fidelity & Deposit Co. of Md., Maryland Casualty Co., by Watkins, Watkins & Eager, Attorneys for Plaintiffs in Error.

[fol. 52½] [File endorsement omitted.]

[fol. 53] Citation, in usual form, showing service on George T. Mitchell, filed December 8, 1931, omitted in printing.

[fol. 54] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed December 8, 1931

The Clerk of the Supreme Court of the State of Mississippi, in making and transmitting the record in the above-entitled cause to the Supreme Court of the United States, will include in the record the following:

(1) Petition for review filed by the appellants in the court below; Record, 2-14, each inclusive.

(2) Affidavit filed by S. B. Lawrence before the Mississippi State Tax Commission; Record 22-23.

(3) Opinion of the Tax Commission; Record, 24.

(4) Certified copy of order of the Tax Commission; Record 26, 27, 28.

(5) Demurrer by the Attorney General of the State of Mississippi. Record 107-108.

(6) Final decree; Record 109-110.

(7) Appeal Bond to Supreme Court of the State of Mississippi; Record 111.

(8) Appeal bon- on the petition for rehearing. Record 15.

(9) Assignment of error in the Supreme Court of the State of Mississippi.

(10) Judgment of affirmance in the Supreme Court of the State of Mississippi.

(11) Opinions delivered by the Supreme Court of the State of Mississippi.

S. B. Lawrence, Fidelity and Deposit Co. of Md., Maryland Casualty Co., Attorneys for Appellants.

Service of the foregoing præcipe acknowledged this 8th day of December, 1931.

George T. Mitchell, Attorney General of the State of Mississippi, by Walter A. Smith, Jr.

[File endorsement omitted.]

[fols. 55 & 56] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY THE APPELLANTS AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Dec. 19, 1931.

S. B. Lawrence, the Fidelity & Deposit Company of Maryland and the Maryland Casualty Company, sureties in the above entitled cause, in order to secure reversal of the judgment of the Supreme Court of Mississippi appealed from, will rely upon the following points:

(1) The taxing power of the Mississippi ended at the borders of the state, and it was without power or authority to impose upon or collect from the appellant an excise tax on income contracted for and earned exclusively beyond the limits of the State of Mississippi.

(2) In the present case, the Supreme Court of the State of Mississippi held that Section 11, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, required the appellant S. B. Lawrence to include within his gross income money contracted for and earned exclusively beyond the limits of the State of Mississippi, and by reason thereof, said statute of the State of Mississippi violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives appellants of their property without due process of law and denies to them the equal protection of the law.

(3) Even if it be true that the State of Mississippi had the power and authority to levy an excise tax against the appellant upon income contracted for and earned by the appellant S. B. Lawrence exclusively beyond the limits of the State of Mississippi, domestic corporations were not required to include such gross income, and for the year 1929, and at all times since said date, the Mississippi State Tax Commission has knowingly and intentionally failed and refused to assess such domestic corporations with income earned beyond the limits of the state, by reason of which the appellant S. B. Lawrence suffered damage and [fol. 58] discrimination, thereby causing said statute of the State of Mississippi hereinbefore referred to, to violate the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law.

(4) Section 11, Chapter 132, Mississippi Laws of 1924, as amended by Chapter 32, Mississippi Laws of 1928, extraordinary session, as construed and enforced against the appellants in this case violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law.

(5) The appellant S. B. Lawrence, in the construction of highways was in active competition with domestic corporations, which domestic corporations were, by the Mississippi

State Tax Commission for the year 1929, and during all subsequent years, knowingly, intentionally and systematically relieved from liability for income earned exclusively beyond the borders of the State of Mississippi. Even if the State of Mississippi had the authority, under any circumstances, which is denied, to impose an excise tax upon such income earned beyond the limits of the state, under the Mississippi statute hereinbefore referred to, then such statute, as construed and enforced, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law.

(6) Other points to be presented at the hearing.

(7) Designation of Portions of Record to Be Printed.

The Clerk of this court will print the entire record in the above-entitled cause transmitted from the Supreme Court of the State of Mississippi.

Wm. H. Watkins, Attorneys for Appellants.

Service acknowledged by copy, this 15th day of December, 1931.

George T. Mitchell, Atty. General, by Walter A. Smith, Jr., Asst. Atty. Gen., Attorneys for Appellee.

[fol. 59] [File endorsement omitted.]

File No. 36,394. Mississippi Supreme Court. Term No. 580. S. B. Lawrence et al., appellants, vs. State Tax Commission of the State of Mississippi. Filed December 19, 1931. File No. 36,394.

FILE COPY

FILED
JAN 12 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE, ET AL, APPELLANTS,

V.

MISSISSIPPI STATE TAX COMMISSION, ET AL., APPELLEES.

SUPPLEMENTAL STATEMENT OF JURISDICTION

WM. H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellants.

In The Supreme Court of The United States

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE, ET AL, APPELLANTS,
V.
MISSISSIPPI STATE TAX COMMISSION, ET AL., APPELLEES.

SUPPLEMENTAL STATEMENT OF JURISDICTION.

Since filing statement of jurisdiction in this case our attention has been directed to the case of *First National Bank of Boston v. Maine*, decided January 4, 1932, and reported in the United States Daily of January 5th, to which the attention of the Court is directed.

The occupation which the Appellant carried on in Tennessee was subject to taxation under the Tennessee Statutes, the same being in the following language:

The Acts of 1927 of Tennessee State Legislature on the subject of contractors, contains the following language:

"CONTRACTORS.

Each person, firm, or corporation engaged in the business of constructing railroads and public roads in this State if the original contractors, shall pay per annum $250.00

Each person, firm or corporation engaged in the business of constructing railroads and public roads in this State as sub-contractors, shall pay per annum $150.00

Provided, that the term 'Contractor' shall apply only to those contractors employing one or more persons and not to any individual who undertakes to alone do the work of his contract.

"CONSTRUCTION COMPANIES.

Each person, firm or corporation, foreign or domestic, operating or doing business in this State, directly or by agent, engaged in the general contracting business of constructing office buildings, public buildings, or other buildings, bridges, water works, drainage works, sewerage systems, and the like, other than public roads or railroad contractors, where the aggregate contract price contracted for construction in any one year exceeds the sum of $500.00, per annum $200.00

For the construction of bridges the contractor is thus subject to an additional tax of $200.00."

Not only that, but the property and equipment from which the income was earned by the Appellant in the State of Tennessee was subject to an ad valorem tax under the Constitution and Statutes of the State of Tennessee.

We are of the opinion that the Appellant in carrying on the occupation of Contractor in the State of Tennessee was subject to other tax liability in the State of Tennessee than

that above set out, as to which the attention of the Court will be directed on the merits.

The foregoing is sufficient to show that the Appellant was subjected to double taxation, first, by the State of Tennessee on the occupation as well as his property used therein; second, by the State of Mississippi on the income earned exclusively beyond the borders of the State.

Respectfully submitted,

Wm. H. Watkins,
R. W. Heidelberg,
Attorneys for Appellants.

FILE COPY

FILED
FEB 23 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE, ET AL., Appellants,

VS.

STATE TAX COMMISSION, ET AL.

STATEMENT AND BRIEF FOR APPELLANTS.

WILLIAM H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellants.

A.

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In The Supreme Court of The United States

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE, ET AL., Appellants,
VS.
STATE TAX COMMISSION, ET AL.

STATEMENT AND BRIEF FOR APPELLANTS.

B.

Reference to the Official Report of the Opinion Delivered in the Court Below.

This case has not been officially reported, but will be found, *S. B. Lawrence et al v. Mississippi State Tax Commission*, 137 So. 503.

C.

Statement of Jurisdiction.

Paragraph 1 Rule 12, has heretofore been complied with, and this Court certified that the case is one of probable jurisdiction.

D.

Summary of Statement of the matters Involved.

Chapter 132, Mississippi legislature 1924, being Section 5027, Mississippi 1930 Code, contains the following language:

> "5027. Imposition of the tax. There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1930 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: On the first $2000.00 of taxable

income, or any part thereof, at the rate of two and one-half per centum; on the next $3000.00 of taxable income, or any part thereof, at the rate of three and one-half per centum; on the next $10,000.00, or any part thereof, at the rate of four and one-half per centum; on all taxable income in excess of $15,000.00, at the rate of five and one-half per centum."

The entire Chapter will be found in Appendix I hereto.

Paragraph (a), Section 5033, Mississippi 1930 Code, being Chapter 32, extraordinary session, Mississippi legislature 1928, contains the following language:

"5033. Gross income defined.—For the purposes, except as otherwise provided for non-residents, the term gross income:

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit, or gains or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received."

Subdivision (11) of Paragraph (b) of said Section 5033, contains the following language:

> "(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising."

The entire section will be found as part of Appendix I to this statement.

S. B. Lawrence, a citizen and resident of Jackson, in the First Judicial District of Hinds County, Mississippi, in the year 1929, as well as in prior and subsequent years, was engaged in the construction of roads, bridges and highways in the states of Mississippi, Alabama, Louisiana and Tennessee. He made such a profit wholly in the State of Tennessee as that if liable for income tax to the State of Mississippi thereupon, he was indebted to the State of Mississippi for $2250.00. Not having included in his gross income for the year 1929 income earned in the State of Tennessee in the construction of highways therein, the Tax Commissioner of the State of Mississippi under Section 5050 Mississippi 1930 Code which section will be found in the appendix hereto, made an assessment against him therefor.

Under Section 5056, Mississippi 1930 Code, which section will be found in the appendix, he applied to the Tax Commissioner for a revision of the tax assessed against him. The Tax Commissioner, however, confirmed the assessment against the appellant. Whereupon, under Sec-

tion 5057, Mississippi 1930 Code, which will be found in the appendix hereto, he applied to the Mississippi State Tax Commission for a rehearing, R. 2, wherein he specifically set up that the act in question would violate the Fourteenth Amendment to the Constitution of the United States if susceptible to the construction that the appellant was subject to an income tax on earnings contracted for and earned in carrying on an occupation exclusively beyond the limits of the State of Mississippi. R. 4. The action of the Tax Commissioner was affirmed by the Tax Commission. Whereupon, under Section 5057, Mississippi 1930 Code, S. B. Lawrence filed a petition in the Chancery Court of the First Judicial District of Hinds County, Mississippi, requesting a hearing of the case on its merits, accompanied by a bond, approved by the clerk of the court, in a sum double the amount of the controversy, conditioned to pay the judgment of the court.

The petition, R. 11, alleged that in the year 1929, he went into the State of Tennessee, entered into certain contracts for the construction of roads therein, wholly within the State of Tennessee; that no part of the contracts was entered into or performed in the State of Mississippi, but that, upon the other hand, such contracts were entered into and performed wholly within the State of Tennessee, where the appellant collected the contract price thereof. That, for the purpose of entering into said contracts and performing the same, he adopted a situs in the State of Tennessee. He therefore alleged that he was not liable for income contracted for and earned in carrying on an occupation wholly beyond the limits of the State of Mississippi.

The petition alleged that he had appeared before the Tax Commissioner of the State of Mississippi and the Mississippi State Tax Commission and made all objections, and had done such things as are required of him under the statute, and alleged that he had met an adverse ruling at the hands of the Commission.

The appellant, in his said petition for rehearing in the Chancery Court of the First Judicial District of Hinds County, Mississippi, specifically set up that said statute violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the appellant of his property without due process of law and denied to him the equal protection of the law. R. 6. At R. 7, the following language is used:

> "Complainant avers that no tax whatever was then and there due, and it was unlawful on the part of the Mississippi State Tax Commission to make said additional assessment against complainant, and it was unlawful on the part of the Mississippi State Tax Commission to deny complainant's petition for a review, but that, on the other hand, said assessment should have been reviewed as prayed for by complainant. That said petition for appeal and review before the entire Commission was filed by the complainant within one year from the date of the notice given to complainant of the assessment of any additional tax.
>
> "Complainant shows unto the court that Section 11, Chapter 132, Mississippi Laws 1924, as amended by Chapter 32, Mississippi Laws, 1928, extraordinary session, violates the Fourteenth Amendment to the Constitution of the United

States in that the same deprives the complainant of his property without due process of law and denies to him the equal protection of the law."

The appellant further alleged that in carrying on in the State of Mississippi and in the surrounding states, including Tennessee, he was engaged in active competition with domestic and foreign corporations, and that under the act complained of, domestic corporations were not required to include in their gross income earned wholly beyond the limits of the state, and that, therefore, said statute violated the Fourteenth Amendment to the Constitution of the United States, in that it discriminated against the appellant, an individual, in favor of domestic and foreign corporations. R. 8.

Again, R. 9, the appellant, in his petition for rehearing, challenged the constitutionality of the act in question as being in violation of the Fourteenth Amendment to the Constitution of the United States, in that the same imposed liability upon him for income earned wholly and exclusively beyond the limits of the state in carrying on an occupation entered into in the State of Tennessee, the language being as follows, R. 9:

"That the legislature of the State of Mississippi is without power and authority to impose and/or collect tax on gains, profits or income derived and earned beyond the limits of the state, and that Section 32, Mississippi legislature, extraordinary session, 1928, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the petitioner of property without due process of law and denies to him the equal protection of the law thereby."

The petition for rehearing, in accordance with the statute, made the proper state officials parties thereto and prayed that a judgment be rendered in accordance with the provisions of the statute, vacating and setting aside the assessment complained of therein. R. 10.

To this petition for rehearing, the Attorney General of the State of Mississippi, for and on behalf of the Mississippi State Tax Commission, filed a demurrer, R. 14.

The matter came on for hearing before the Chancery Court of the First Judicial District of Hinds County, Mississippi. The demurrer filed on behalf of the Mississippi State Tax Commission by the Attorney General of the State of Mississippi was sustained and a final judgment rendered against appellant and the Fidelity & Deposit Company of Maryland, his surety, for the amount of the tax complained of. R. 15.

S. B. Lawrence and the Fidelity & Deposit Company of Maryland prosecuted an appeal to the Supreme Court of the State of Mississippi by giving a bond for the amount and in the form provided by the statute. R. 16.

In the Supreme Court of the State of Mississippi, S. B. Lawrence and the Fidelity & Deposit Company of Maryland, his surety, filed an assignment of error, wherein it was claimed that Chapter 32, Miss. Laws of 1928, extraordinary session, being an amendment to Section 11, Chapter 132, Mississippi Laws of 1924, being Section 5033, Mississippi 1930 Code, as construed and enforced in this case, violated the Fourteenth Amendment to the Constitution of the

United States, in that the same deprived the appellants of their property without due process of law and denied to them the equal protection of the law, R. 17.

The Supreme Court of the State of Mississippi affirmed the action of the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, in affirming the judgment against appellants, R. 19, used the following language:

> "The Mississippi State Tax Commission, in accordance with the provisions of the Mississippi statutes on the subject, took steps to assess him with the income tax imposed by law. The appellant appeared before the State Tax Commission and objected to the assessment of the said income tax, contending that he is not subject to the income tax upon money earned outside of the State of Mississippi in the contract above referred to; that the state could not, under the 14th section of the Bill of Rights of the State of Mississippi, or the Fourteenth Amendment to the Constitution of the United States, impose liability for income earned as result of performing labor or pursuing an occupation beyond the limits of the state. On the hearing, the Tax Commission assessed him with an income tax on the income earned out of the state. The appellant thereupon filed a bill in chancery in accordance with Section 5057, Code of 1930, to review the assessment. He contended that Chapter 32, extraordinary session, Mississippi legislature 1928 did not impose liability for income earned wholly out of the State of Mississippi; that if the statute should be so construed and enforced as to impose liability upon him for such

income, then the statute would violate the above sections of the Constitution."

Upon the question of discrimination by reason of the fact that domestic corporations were not required to include gross income earned wholly beyond the limits of the state, the court held that such provision itself was stricken down, and that both individuals and domestic corporations were liable for income earned wholly beyond the limits of the state. Accordingly, judgment was rendered against S. B. Lawrence, appellant, the Fidelity & Deposit Company of Maryland, surety on his bond from the State Tax Commission to the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Maryland Casualty Company, surety on the bond of both of them to the Supreme Court of the State of Mississippi. Both of said sureties join in this appeal as appellants.

E.

ARGUMENT

POINT I.

The statute of the State of Mississippi complained of violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law, in that the statute, as construed and enforced in this case, imposed liability upon the appellant for an excise, occupation or privilege tax on income contracted for and earned in the following an occupation wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee. Consistent with

the Fourteenth Amendment to the Constitution of the United States, a state may not tax persons, property or an occupation, or the income earned therefrom, beyond the limits of the state.

(a) *The tax imposed upon Lawrence, the appellant, an excise, and not a property tax.*

The Supreme Court of the State of Mississippi has expressly held the tax in question to be an excise tax.

Section 112 of the Constitution of the State of Mississippi, which section is published in full as Appendix II to this brief, provides that taxation shall be uniform and equal throughout the state, and that property shall be taxed in proportion to its value.

In determining the validity of this tax under Section 112 of the Constitution of the State of Mississippi, in order to sustain the same at all, the Supreme Court of the State of Mississippi necessarily had to construe the tax to be other than a property tax. The nature thereof has been presented to the Supreme Court of the State of Mississippi upon two occasions, and has been uniformly designated as an excise tax.

This was so held in *Hattiesburg Grocery Co. v. Robertson, State Revenue Agent,* 126 Miss. 34, 88 So. 4, 25 A. L. R. 748.

And the question was re-examined and affirmed in the case of *State ex rel. Knox v. G. M. & N. R. R. Co.,* 138 Miss. 70, 104 So. 689, wherein the court used the following language:

"The question presented for decision in these cases is the validity vel non of the Income Tax Act, (Chap. 132, Laws of 1924), by which a tax is imposed on all but certain excepted net incomes from whatever source derived. The ground on which it is claimed that the act is void is that it is in conflict with the Fourteenth Amendment to the Federal Constitution and with several sections of the State Constitutions, to which, when necessary, reference will be hereinafter specifically made.

"As to the provision of Section 112 of the State Constitution, that 'property shall be taxed in proportion to its value,' and 'shall be assessed for taxes under general laws, and by uniform rules, according to its true value,' the appellees' contention in this connection is that a tax on income derived from property is a tax on the property from which the income is derived, and, as the tax here imposed is on all income, it was, insofar as it affects income from property, a tax on the property from which the income was derived, which property the Constitution permits to be taxed only in proportion and according to its true value.

"This contention is ruled by *Hattiesburg Grocery Co. v. Robertson*, 126 Miss.. 34, 88, So. 4, 25 A. L. R. 748, wherein this court, after mature consideration, *held that a tax on income is an excise* and is not a tax on the property from which the income may have been derived. As was there pointed out, a tax on income from property includes some of the elements both of a tax on property and of a tax on persons, and cannot be classified as strictly a tax on either alone. Property of itself alone cannot produce income, but must be used or dealt with in some way by a person before gain or income can be derived there-

from, and no definition of income, though derived from property, can be framed which does not include the activities of the person by whom it was produced, received or enjoyed.

"A tax, though not eo nomine on property, but which the owner thereof must pay merely because of his ownership of the property, (*Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891), or because of a special use of property without reference to whether or not revenue or gain is derived therefrom, (*Thompson v. McLeod*, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674), is a tax on the property, and should be in proportion and according to the value thereof. *But the tax here imposed is not on the ownership or use without gain of property, but is on the revenue which the activities of the owner cause the property to produce. The taxation of such property is universal, and is the basis of most of our privilege taxes.*"

In other words, the tax imposed by the statute, as construed by the Supreme Court of the State of Mississippi, is an excise, occupation or privilege tax on the activities of the owner, which activities of the owner took place wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee, where contracts for the construction of highways were entered into, executed and performed, and the compensation therein collected, and it is this income contracted for and earned in carrying on an occupation wholly beyond the limits of the State of Mississippi, in the State of Tennessee, that is taxed as an excise or occupation tax. Such is the construction placed upon the act by the Supreme Court of the State of Missis-

sippi, which is binding upon this Court. *Bandini Pet. Co. v. Superior Court of the State of California*, October Term, 1931, No. 43, decided November 23, 1931, Advance Sheets, 76 L. Ed. 123; *Lindsey v. Natural Carbonic Acid Gas, Co.*, 220 U. S. 61, 73, 55 L. Ed. 369, 375. Such construction is part of the statute, and is binding on this Court. *Farmers Irrigation Dist. v. Nebraska*, 244 U. S. 325, 61 L. Ed. 1168; *New York ex rel. New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 62 L. Ed. 337; *La Tourette v. McMaster*, 248 U. S. 465, 63 L. Ed. 362; *Vigliotti v. Pa.*, 258 U. S. 403, 66 L. Ed. 686; *Supreme Lodge v. Meyer*, 265 U. S. 30, 68 L. Ed. 885; *Supreme Lodge v. Eiser*, 265 U. S. 41, 68 L. Ed. 891.

The Supreme Court of the State of Mississippi, in construing its own constitution and statutes, held that a tax could not be imposed merely upon the ownership of property, *Thompson v. Kreutzer*, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674.

The tax was not a lieu tax. In the case of *Chicago, R. I. & P. R. R. Co. v. Robertson, Rev. Agent*, 122 Miss. 417, 84 So. 449, the court held that Chapter 113, Miss. Laws of 1912, providing for a fixed charge on the gross receipts of a freight line company in lieu of all taxes on the property of the company used in its business in the state was void as violative of Section 112 of the state constitution. If the income tax complained of had been a property tax, it would have been void under Section 112 of the state constitution aforesaid. See Appendix II. *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891; *Thompson v. McLeod*, 112 Miss. 383, 73 So. 193.

Money not subject to taxation in Mississippi. Code, Sec. 3108, Appendix III.

(b) *State of Mississippi without authority to levy an excise tax on income earned beyond the borders of the State.*

The case of *First National Bank of Boston v. Maine*, 284, U. S. ....., Adv. Sheets No. 5, 76 L. Ed. 211, was a case in which a citizen of Massachusetts owned shares of stock in a Maine corporation. Upon the death of the owner of the stock, the same was transmitted by descent or devise in the State of Massachusetts. Since the corporation was domiciled in Maine and transacted most of its business there, the latter state asserted the right to impose a tax upon the transfer thereof. This Court held that the tax was upon the transfer by death, and that such transfer took place in the State of Massachusetts, and could not be taxed in the State of Maine. The Court used the following language:

> "It was by the Frick case, however, that the rule become definitely fixed that, as to tangible personal property, the power to tax is exclusively in the state where the property has an actual situs; and this, as will be seen later, has an important bearing on the present case. Mr. Frick, domiciled in Pennsylvania, died testate owning tangible personal property having an actual situs in New York and Massachusetts. His will was probated in Pennsylvania, and a statute which provided for such a transfer tax was imposed under a Pennsylvania statute which provided for such a tax on all property of a resident decedent, whether within or without the state. Ancillary letters were

granted in New York and Massachusetts. We decided, pp. 488-492, that the Pennsylvania tax, in so far as it was imposed upon the transfer of tangible personalty, having an actual situs in other states, was in contravention of the due process clause of the 14th Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they can not be given extra-territorial operation; and (3) that as respects tangible personal property, having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the owner's domicile.

"The tax there under consideration was not a property tax, but one laid on the transfer of property on the death of the owner, and, as to that, the court said (p.492):"

And, on page 215, the Court also used the following language:

"It long has been settled law that real property can not be taxed, or made the basis of a inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state,

and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.'

And, on page 216, the Court also used the following language:

> "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and if is unreasonable, and incompatible with a sound construction of the due process of law clause of the 14th Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."

The immunity on the part of the appellant from liability for the imposition of the tax in this case is even clearer than that of the taxpayer under the case above-cited. In the present case, the appellant acquired a domicile, assembled personal property with which to construct highways, and in the State of Tennessee, entered into one or more contracts for the construction of highways, fully performed the same in the State of Tennessee, where settlement was had, where payment was made, no part of which occurred in the State of Mississippi.

In the case last above-cited, the corporation itself was situated in Maine and the actual transfer of stock had to take place in that state. In the present case, nothing took place in the State of Mississippi.

The case of *Hans Rees' Sons, Inc., v. North Carolina*, 283 U. S. 123, 75 L. Ed. 879, is in point. There, the appellant operated a tannery in the State of North Carolina, where it manufactured all of its product. It had a warehouse and sales office in the City of New York, where it was incorporated. It contended that not more than seventeen per cent. of its entire business was done in the State of North Carolina, and offered proof in support thereof. The State of North Carolina contended that since all of its manufacturing was done in that state, the business should be treated as a unit, and allocated eighty-five per cent. of its taxable income to the State of North Carolina, the effect of which was to enable the State of North Carolina to levy an excise tax upon income earned beyond the borders of the state. This Court held that the taxing power of the State of North Carolina was limited by the bounds of the state, using the following language at page 136:

> "For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question, operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that state. In this view, the taxes as laid were beyond the

state's authority. *Shaffer v. Carter*, 252 U. S. 37, 52, 53, 57, 64 L. Ed. 445, 456, 457, 40 Sup. Ct. 221."

In the case of *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 74 L. ed. 371, a resident of New York owned certain certificates issued by the state of Minnesota. The owner died in New York, and the state of Minnesota asserted the right to impose an excise tax thereupon on the theory that the tax could be imposed at the domicile of the owner or at the domicile of the creditor. The court held otherwise, using the following language:

> "In this court the presently approved doctrine is that no state may tax anything not within her jurisdiction, without violating the 14th Amendment. State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. Ed. 179; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83, ante. 180, 50 Sup. Ct. Rep. 59. Also, no state can tax the testamentary transfer of property wholly beyond her power (*Rhode Island Trust Co. v. Doughton*, 270 U. S. 69, 70 L. ed. 475, 43 A. L. R. 1374, 46 Sup. Ct. Rep. 256), or lipose death duties reckoned upon the value of tangibles permanently located outside her limits (*Frick v. Pennsylvania*, 268 U. S. 473, 69 L. ed. 1058, 42 A. L. R. 316, 45 Supt. Ct. Rep. 603). These principles became definitely settled subsequent to *Blackstone v. Miller*, and are out of harmony with the reasoning advanced to support the conclusion there announced."

In the case of *Frick v. Commonwealth*, 268 U. S. 473, 69 L. ed. 1058, a man died in Pennsylvania owning property in Pennsylvania, New York and Massachusetts. Pennsylvania, which has an excise tax, imposing a tax for the transfer of the property wherever it might be situated, even imposed a tax upon tangible property, upon the transfer of property in other states. The court held that this could not be done, using the following language:

> "The plaintiffs in error are the executors and an interested legatee. They contended in the state court, and contend here, that in so far as the Pennsylvania statute attempts to tax the transfer of tangible personal property having an actual situs in states other than Pennsylvania, it transcends the power of that state, and thereby contravenes the due process of law clause of the 14th Amendment to the Constitution of the United States.
>
> "This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, in violation of the 14th Amendment, secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extraterritorial operation; and thirdly, that as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicile of the owner."

In the case of *Safe Deposit Trust Co. v. Virginia*, 280 U. S. 83, 74 L. ed. 180, certain intangible property was placed in the hands of trustees beyond the limits of the state of Virginia. The state of Virginia sought to levy an excise tax upon the transfer thereof by death. This court held that since the beneficiary could not change the status of the property and the donor had not exercised the right of revocation during his lifetime, that the property was not subject to an income tax in the state of Virginia, using the following language:

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another state. We think not. The reasons which led this court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, and *Frick v. Pennsylvania*, supra, to deny application of the maxim mobilia sequuntur personam to intangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive. And the fiction of mobilia sequuntur personam 'was intended for convenience, and not to be controlling where justice does not demand it'."

We do not contend that the contract to build the highway in the state of Tennessee was an intangible one. Upon the other hand the status was more nearly akin to the status

of real or tangible property. The activities of the owner from which the revenue was derived took place exclusively in the state of Tennessee, and the operations, that is to say the building of the highway, were had with the material and equipment, personal property of a tangible nature, exclusively situated in the state of Tennessee. That the state of Mississippi could impose an excise tax neither upon the income from the property nor the activities of the owner in utilizing the same for the construction of highways in the state of Tennessee.

The case of *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. ed. 297, presented the case where a Missouri corporation operated a cotton compress in the state of Arkansas. The statutes of the latter named stated required that all property situated in the state be insured in companies authorized to do business in the state, and imposed a tax of 5 per cent on the premiums paid if any company who insures its property in a company or companies not admitted to do business in the state. The appellant entered into a contract in the state of Missouri with an insurance company to insure its property. The state of Arkansas brought suit against the appellant for the premium tax. This court held that the contract of insurance was made entirely out of the state of Missouri and that no liability could be imposed therefor by the state of Arkansas, using the following language:

> "The name given by the state to the imposition is not conclusive. *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. ed. 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449; *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061, 42 Sup. Ct. Rep. 549. In Louisiana

the detriment was $1,000. Here it is 5 per cent upon the premiums,—which is 3 per cent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the state. This case is stronger than that of Allgeyer in that here no act was done within the state, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside. The other limit upon the state's power, due to its having permitted the plaintiff in error to establish itself as alleged, need not be considered here."

In the case of *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, a resident of the state of Illinois engaged in the business of drilling for oil in the state of Oklahoma, the latter state imposed an excise tax upon the income arising therefrom. The petitioner contended that since he was a citizen and resident of Illinois his, a personal occupation although carried on in Oklahoma could not be taxed there. This court in that case took occasion to express the correct rule in respect to the taxing powers of states, using the following language:

"The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, while denying their power to impose a tax upon any of the operations

of the Federal government, Mr. Chief Justice Marshal, speaking for the court, conceded (pp. 428, 429) that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction, saying: 'It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation,' etc. In *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459, the court by Mr. Justice Brewer, said (pp. 292, 293): 'We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods.' That a state may tax callings and occupations as well as persons and property has long been recognized. 'The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. . . . It (taxation) may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.' State Tax on Foreign Bonds, 15 Wall. 300, 319, 21 L. ed.

179, 186. See also *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. ed. 347, 348; *Armour & Co. v. Virginia*, 246 U. S. 1, 6, 62 L. ed. 547, 550, 38 Sup. Ct. Rep. 267; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522."

According to the rule anounced in the foregoing, a state may tax property situated within its borders, or income earned therein. The occupation, however, out of which the income arises as well as the tangible property taxed must be within the jurisdiction of the state.

In the case of *New York Life Insurance Co. v. Dodge*, 246 U. S. 257, 62 L. ed. 772, a citizen of Missouri took out a life insurance policy in that state from the appellant, the New York Life Insurance Company. A local statute provided that after three annual premiums had been paid on a life insurance policy that the same should not become forfeited for the non-payment of premiums, that three-fourths of the net value of the policy should be applied to paying premium notes, the remaining one-fourth applied to purchasing temporary insurance. The assured went to the state of New York and hypothecated the policy for a cash loan. The loan was not paid and the interest of the assured was foreclosed according to the terms of the loan agreement. After the death of the assured suit was brought on the policy in Missouri, and the Missouri statute above referred to was invoked to prevent a forfeiture of the policy. This court held that the statute violated the 14th Amendment to the Constitution of the United States, in that extra-territorial effect was given thereto. The

court reaffirmed its opinion in *New York Life Insurance Co. v. Head*, 234 U. S. 149, 58 L. ed. 1259:

> "'It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority and upon the preservation of which the government, under the Constitution depends.' The reasoning advanced by the Missouri supreme court to support its ruling was thus summarized: 'As foreign insurance companies have no right to come into the state and there do business except as the result of a license from the state, and as the state exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the state as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies, and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law.' And this argument we declared unsound since the 'proposition cannot be maintained without holding that because a state has power to license a foreign insurance company to 'do business within its borders and the authority to regulate such business, therefore a state has power to regulate the business of such company outside its borders and which would otherwise be beyond the state's authority,—a distinction which brings the contention right back to the primordial

conception upon which alone it would be possible to sanction the doctrine contended for; that is, that because a state has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other states.'"

In the case of *Provident Savings Life Assurance Society v. Commonwealth of Kentucky*, 239 U. S. 103, 60 L. ed. 167, the appellant for seven years was engaged in writing policies of life insurance in the state of Kentucky, wherein there was imposed by statute a tax on premiums collected by the company on such policies written in the state. Subsequently, the company retired and ceased to do further business in the state. It permitted, however, its outstanding policies to remain in force and premiums were remitted by the assureds in such policies to the company's general office out of the state. The state of Kentucky asserted the right to collect a premium tax therefor. This court held that what the company did was not by consent of the state, that it did nothing within the state, and, therefore, consistent with the 14th Amendment to the Constitution of the United States liability could not be imposed merely because the company saw fit to leave its policies of insurance in force and receive the premium outside the state. The court used the following language:

"It had sought to withdraw itself completely from the state. The conclusion that it continued to do business within the state, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to the policy holders resident in Kentucky under policies previously issued in that state, and that it received the renewal premiums upon these poli-

cies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the state's consent. But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the state. It is true that acts might be done within the state in connection with such policies (as, for example, in maintaining an office or agents, although new insurance was not written or solicited) which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the state cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control. *Allgeyer v. Louisianas*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 241, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597; *New York L. Ins. Co. v. Head*, 234 U. S. 149, 163, 58 L. ed. 1259, 1265, 34 Sup. Ct. Rep. 879."

In the case of *Western Union Telegraph Co. v. Kansas*, 54 L. ed. 355, 216 U. S. 1, as a condition precedent to the right of the telegraph company to do business in the state of Kansas, a tax was imposed upon the entire authorized capital stock of the company which represented large holdings of property beyond the limits of the state. This court held that the act violated both the commerce clause and the due process clause of the Constitution of the United States, using the following language:

> "The state court ought to have refused the affirmative relief asked, and dismissed the petition upon the ground that the condition sought to be enforced by a decree of ouster was in violation of the commerce and due-process clauses of the Constitution and of the company's rights under that instrument. The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution."

In the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, the statute of Kentucky contained the following language:

> "Section 4020 of the Kentucky statutes, under which this assessment was made, provides that

'all real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale'."

The state attempted to tax the personal property of the corporation situated beyond the limits of the state. This court took occasion carefully to define the taxing power of the state, using the following language:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. *Northern C. R. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88; State Tax on Foreign-held Bonds, 15 Wall. 300, 21

L. ed. 179; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490-499, 22 L. ed. 189-193; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669. In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the 14th Amendment. See also *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 519, 35 Am. St. Rep. 515, 33 N. E. 695."

In the case of *D. L. & W. Railroad Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, this court held that the enforcement of a statute of the state of Pennsylvania against the appellant which required that the appraisement of the capital stock of a domestic corporation, the value of coal mined by it within the state then situated in other states there awaiting sale when the appraisement was made violated the 14th Amendment to the Constitution of the United States.

In the case of *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, the state of Kentucky imposed liability upon the appellant for taxation purposes of a franchise owned and exercised by it in the state of Indiana. This court held that the franchise was situated in the state of Indiana was in the nature of incorporeal hereditaments, enjoyed the protection of the laws of the state of Indiana and not that of Kentucky, and held that

the statute of the state of Kentucky justifying the liability violated the 14th Amendment to the Constitution of the United States, using the following language:

> "This view if not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a situs in another state. There is no suggestion in the company's charter that the state would ever, in any form, tax its property having a situs in another state. We express the opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decided nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its situs, for purposes of taxation, in Indiana."

In the case of *Allgeyer v. State of Louisiana*, 165 U. S. 517, 41 L. ed. 832, a citizen of the state of Louisiana through the medium of the United States mail made a contract in the state of New York for fire insurance covering certain

property in the state of Louisiana. The state of Louisiana had a statute imposing a fine of $1,000.00 for effecting fire insurance on property in Louisiana outside of the state. The appellant made three such contracts, and suit was brought for $3,000.00. This court held the act unconstitutional as violating the 14th Amendment to the Constitution of the United States, using the following language:

> "Has a citizen of a state, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him?" We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of *Hooper v. California*, 155 U. S. 648, and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged

> right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

In the case of *Cleveland, etc. R. R. Co. v. Pennsylvania*, 15 Wall. 300, 21 L. ed. 179, which was a case where the appellant railroad company issued bonds secured by a mortgage on its property portions of which were in the state of Pennsylvania; the bonds were made payable in New York City, but many of them were sold to persons out of the state of Pennsylvania. The statute of the latter mentioned state required the treasurer of the railroad company to withhold 5 per cent of all interest paid on bonds for the benefit of the state; the purpose of the holding was in the nature of a tax imposed. The railroad company resisted the collection of the tax on the ground that the bonds belonged to persons out of the state, and that neither the bonds nor the income derived therefrom were situated in Pennsylvania, and were not subject to its taxing power. This court held that as to the bonds owned by persons living out of the state the tax was non-taxable, using the following language:

> "We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the Company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax

upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extraterritorial operation; nor can any law of that State, inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extraterritorial invalidity of state laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court. *Ogden v. Saunders,* 12 Wheat. 214; *Baldwin v. Hale,* 1 Wall. 223 (68 U. S., XVII, 531). A like invalidity must, on simple grounds, attend state legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State."

In the case of *Arpin v. Eberhardt,* (Wis.) 147 N. W. 1016, the supreme court of Wisconsin held that its own statute imposing an excise tax upon earnings should be limited to those earned within the borders of the state other than incomes from intangibles, using the following language:

"Certain considerations occur to us which might have induced the Legislature to refrain from taking income derived from sources without the state, except as specified. It was no doubt the desire of the Legislature to prevent the loan or investment of moneys without the state for the purpose of receiving a fixed return for the investment made, so as to avoid the payment of a tax

on this species of property. The property of this firm was taxable in the state where located. If incomes were taxed in that state, the income would also in all probability be taxed there. If the income were taxed here; it might be doubly taxed. Conceding the right to impose such double taxation, the Legislature might well feel that it would not be just to do so. Other considerations might be mentioned, but those suggested should suffice."

It is our contention that the construction had by the supreme court of Wisconsin upon its statutes was one required in order that the same might not offend the 14th Amendment of the Constitution of the United States. The legislature of the state of Wisconsin was doubtless of the opinion that it could not under the 14th Amendment levy an excise tax upon income earned exclusively out of the state except as to intangibles, and the supreme court of Wisconsin doubtless attributes such intention in adopting the construction which it gave to the act. So appellant contends in this case that if he had owned any intangibles beyond the limits of the state of Mississippi, such as bonds, stocks, notes, etc., that such intangibles would follow his domicile and the income therefrom would be subject to taxation in Mississippi, but that the making and performing a contract for the construction of highways in the state of Tennessee which required the assembling of the necessary equipment, the construction of the highways wholly within the state of Tennessee was not an intangible, but was income derived solely from exercising an occupation wholly within the state of Tennessee. That state of Mississippi could not have authorized the doing of the things which were done and could not have prohibited the same. The

tax payer owed allegiance while in Tennessee in performance of the contract to the state of Tennessee, and received no kind of protection or assistance from the state of Mississippi.

(c) *SINCE AN OCCUPATION CARRIED ON WHOLLY BEYOND THE LIMITS OF THE STATE MAY NOT BE TAXED AT THE SOURCE, THE INCOME ARISING THEREFROM IS NOT, CONSISTENT WITH THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, SUBJECT TO TAXATION.*

In the case of *National Life Insurance Co. v. United States*, 277 U. S. 508, 72 L. ed. 968, the court had before it for review the Act of Congress imposing a tax upon life insurance companies. The company was allowed an exemption from such taxation equal to 4 per cent of the company's legal reserve. In calculating a 4 per cent, however, the United States required the tax payer to include interest received from state obligations. This court held that since the securities themselves were not subject to taxation income arising therefrom could not be taxed, using the following language:

> "*Miller v. Milwaukee*, 272 U. S. 713, 71 L. ed. 487, 47 Sup. Ct. Rep. 280.
>
> "Held: That 'where income from bonds of the United States which by act of Congress is exempt from state taxation is reached purposely, in the case of corporation-owned bonds, by exempting the income therefrom in the hands of the corporation, and taxing only so much of the stockholders' dividends as corresponds to the corporate income not assessed, the tax is invalid.'

"It is settled doctrine that directly to tax the income from securities amounts to taxation of the securities themselves. *Northwestern Mut. L. Ins. Co. v. Wisconsin*, 275 U. S. 136, ante, 202, 48 Sup. Ct. Rep. 55. Also, that the United States may not tax state or municipal obligations. *Metcalf v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 391, 49 Sup. Rep. 172."

In the case of *Gillespie v. Oklahoma*, 256 U. S. 501, 66 L. ed. 338, there was an attempt by the state of Oklahoma to assess the appellant with income as a lessee of Indian lands. The court held that the lease could not be taxed since the same was an instrumentality of the United States government, and therefore never could the income arising therefrom be taxed, using the following language:

"Whether this property could be taxed in any other form or not it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

In the case of *Indian Territory Illiminating Oil Co. v. Oklahoma*, 240 U. S. 522, 60 L. ed. 779, it was held that the state could not assess to a corporation an oil and gas lease of Indian lands, and that in assessing the capital stock of the corporation the value of the lease should not be included.

Upon the question now under discussion touching the right of the state to impose an excise tax upon one of its

citizens for income earned in carrying on an occupation beyond the limits of the state contented itself by making reference to the case of *State, Ex Rel Knox, Attorney General v. G. M. & N. Railroad Co.* 138 Miss. 70, 104 So. 689, supra. In the case the court cited as justifying its position *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445. The anouncement contained in that case, however, does not support the conclusion reached by the supreme court of the state of Mississippi in respect to its authority to levy an excise tax upon income for an occupation earned beyond the limits of the state. As a matter of fact, the case holds just the contrary as will appear from the discussion of the case contained herein. The supreme court of the state of Mississippi likewise referred to the case of *Maguire v. Trefry*, 253 U. S. 12, 64 L. ed. 738.

In that case, the appellant was a risident of Boston, Mass. She was the beneficiary of a trust estate consisting of intangibles in the hands of a trustee in the State of Pennsylvania, from which trust estate she acquired certain income. There are two differences between that case and the one before the court. In that case, the securities were intangibles, and the doctrine of mobilia sequuntur personam applied. In other words, the situs of the intangibles followed the domicile of the beneficiary, which was in Massachusetts. The second difference is that the tax was not an excise tax, but a property tax according to the laws of the State of Massachusetts. *Tax Commission v. Putnam*, 227 Mass. 522, L. R. A. 1917F, 806, 116 N. E. 804.

This court has recently had occasion to limit the application of the case in *Safe Deposit & Trust Co. v. Virginia*,

280 U. S. 83, 74 L. ed. 180, in respect to which the following language was used by this court:

> "The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire v. Trefrey*, supre."

That is to say, the tax imposed by the state of Massachusetts was intended as the equivalent of a property tax upon the fair value of any interest which the appellant had in the securities measured by the income arising therefrom. Suppose, however, that the appellant, though living in Massachusetts, had each day gone into Pennsylvania and followed some occupation, such as a day laborer, clerking in a store or selling goods. It could not be contended that an excise, privilege or occupation tax could have been imposed upon her for performing manual labor in another state. And the case of *Maguire v. Trefrey*, supra, is not an authority for such position. As a matter of fact, we have the converse of the proposition in the supreme court of the state of Massachusetts in the case of *Hutchins et al v. Commissioner of Taxation*, 172 N. E. 605. In that case, a trust estate was situated in the state of New York. The trustees, however, resided in the state of Massachusetts. The supreme court of Massachusetts held that the income was not subject to taxation, using the following language:

> "In our opinion, it follows that there was no jurisdiction to levy the taxes on the gains of the two New York trusts. For discussion of cognate questions, see *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 202, 26 Sup. Ct. Rep. 36,

50 L. Ed. 150, 4 Ann. Cas. 493, *Frick vs. Pennsylvania*, 268 U. S. 373, 288, 489, 45 Sup. Ct. Rep. 603, 69 L. Ed. 1058, 42 A. L. R. 316; *Rhode Island Hospital Trust Co. vs. Doughton*, 270 U. S. 69, 46 Sup. Ct. Rep. 256, 70 L. Ed. 475, 43 A. L. R. 1347; *Blodgett vs. Silberman*, 277 U. S. 1, 12, 18, 48 Sup. Ct. Rep. 410, 72 L. Ed. 749; *Brooke vs. Norfolk*, 277 U. S. 27, 29, 48 Sup. Ct. Rep. 422, 72 L. E. 767."

The supreme court of New Hampshire in the case of Opinion of the Justices, 149 Atl. 321, announced the following rule:

"The provision for the taxation of rents can not be applied to rent paid for the use of real property situated outside the state, although the rent is received by a resident. It has always been the accepted rule that a state can not lay a tax upon realty not within its jurisdiction. *Winnipiseogee, etc., Co. v. Gilford*, 64 N. H. 337, 349, 10 A. 849. The same principle applies to tangible personal property. *Union, etc., Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Frick v. Pa.*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316; *Winkley v. Newton*, 67 N. H. 80, 36 A. 610, 35 L. R. A. 756.

"In *Pollock v. Farmers Loan & League Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759, Id., 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108, it was held upon great consideration that a tax laid upon rent is a direct tax upon the land out of which the rent issues. Opinion of the Justices, 77 N. H. 611, 615, 626, 93 A. 311.

"While the question whether a state could tax rent received for the use of realty over which the

state had no jurisdiction was expressly excluded from consideration in *Union, etc., Co. v. Kentucky*, supra, the logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions federal constitution. *Nat. Life Ins. Co. v. U. S.* 277 U. S. 508, 48 S. Ct. 591, 72 L. Ed. 968; *Gillespie v. Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. Ed. 338.

"We are of the opinion that a state can not tax income received as compensation for the use of either real estate or tangible personal property which has a situs outside the state. To avoid a misapprehension, we add that this limitation does not apply to the taxation of intangibles owned by residents. *Hawley v. Malden*, 232 U. S. 1, 34 S. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C 842."

(d) *THE INCOME EARNED AND THE PROPERTY WITH WHICH THE SAME WAS EARNED SUBJECT TO TAXATION IN TENNESSEE.*

The 1927 Acts of the Tennessee legislature imposed the following taxes upon highway contractors:

"CONTRACTORS.

Each person, firm or corporation engaged in the business of constructing railroads and public roads in this State if the original contractors, shall pay per annum $250.00

Each person, firm or corporation engaged in the business of constructing railroads and public roads in this State as sub-contractors, shall pay per annum $150.00

Provided, that the term 'Contractor' shall apply only to those contractors employing one or more persons and not to any individual who undertakes to alone do the work of his contract.

"CONSTRUCTION COMPANIES.

Each person, form or corporation, foreign or domestic, operating or doing business in this State, directly or by agent, engaged in the general contracting business of constructing office buildings, public buildings or other buildings, bridges, water works, drainage works, sewerage systems, and the like, other than public roads or railroad contractors, where the aggregate contract price contracted for construction in any one year exceeds the sum of $500.00, per annum $200.00

For the construction of bridges the contractor is thus subject to an additional tax of $200.00."

The appellant was under the protection of the laws of the state of Tennessee as was the property engaged therein while carrying on the occupation out of which the income arose.

In addition to the foregoing privilege tax on contracts under Section 28 of the State Constitution of the State of Tennessee, the tangible property had by the appellant in the State of Tennessee was subject to taxation.

We file herewith as Appendix IV of this brief copy of said section of the State of Tennessee.

Since the appellant carried on an operation in the State of Tennessee, he was not only subject to the privilege or occupation tax hereinbefore set out, and not only liable for tax on any tangible property, but subject to any income tax which the State of Tennessee might impose. In the mean time, the State of Tennessee has imposed a tax on income. A copy of said act is not available to the appellant at the writing of this brief, but will be made Appendix I to appellant's reply brief.

In the State of Mississippi the appellant was subject to ad valorem tax on all tangible property owned by him in the state. See Section 112 of the Mississippi Constitution in the appendix. He was subject to an excise tax on all income earned within the state; and since the first day of June 1930, has been subject to an occupation tax as a contractor under Section 54 Mississippi Laws of 1930, memorandum of which is hereto annexed as Appendix V.

We submit that the appellant should only be required to *"render unto Caesar the things which are Caesar's,"* and this he does when he pays a property tax on all tangible property in the state and for occupations engaged in within the state. He owed allegiance to the State of Tennessee and was liable to it for building highways in the State of Tennessee and the property therein engaged was subject to taxation and taxed within that jurisdiction.

POINT II.

No liability is imposed upon domestic corporations engaged in competition with appellant in the construction of highways in Mississippi or adjoining states, including Tennessee, under similar circumstances.

No liability has been attempted to be imposed by the taxing authorities upon domestic corporations. Therefore, the act violates the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore mentioned. Paragraph 11 of the act complained contains the following language:

> "(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising."

The petition for review in this case set out that the appellant Lawrence, during the year 1929, was engaged in competition with domestic and foreign corporations in constructing highways in Mississippi and in Tennessee under the identical circumstances. Not only is it true that the act imposed no liability upon such corporations, but the taxing authorities of the State of Mississippi have customarily, intentionally and uniformly relieved domestic corporations from all liability for income earned out of the state.

In *Quaker City Cab Co., v. Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, the legislature of the State of Pennsylvania imposed an excise tax on the gross receipts of corporations operating taxicabs. It appeared from the facts that corporations operating taxicabs were in direct competition with individuals and partnerships engaged in the same business. This court held that the act violated the Fourteenth Amendment to the Constitution of the United States, using the following language:

"Plaintiff in error was subject to competition in its business by individuals and partnerships operating taxicabs. The act does not apply to them, and no tax is imposed on their receipts. Corporations operating taxicabs are not exempted from any of the taxes imposed on natural persons carrying on that business. And every such corporation, whether domestic or foreign, pays a capital stock tax of five mills on the actual value of its capital stock and a bonus of one-third of one per cent pe the par value of all stock issued if it be a domestic corporation, and a like rate on its capital employed in Pennsylvania if it be a foreign corporation. Act of July 22, 1913, P. L. 903, Sec. 1, Act of May 3, 1889, P. L. 903, Art. 1, Act of May 8, 1901, P. L. 159. The supreme court said that it is immaterial whether individuals engaged in a like taxicab business are subject to the tax here involved and that corporations may be placed in a class separate from individuals and so taxed.

"The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U. S. 544, 550, 67 L. Ed. 1112, 1115, 43 Sup. Ct. Rep. 636. The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to difference in situation or forbid classification in that connection, but it does require that the classification be not arbitrary but based

on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 493, 71 L. Ed. 1165, 1167, 47 Sup. Ct. Rep. 678."

The following authorities are directly in point: *W. A. Frost v. Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483; *Southern Railway Co. v. Green*, 216 U. S. 400, 54 L. Ed. 536; *Royster Guano Co. v. Virginia*, 253 U. S. 412, 64 L. Ed. 989; *Chalker v. Railway Co.*, 249 U. S. 522, 63 L. Ed. 748.

The Supreme Court of the State of Mississippi in the case recognized the unjustifiable discrimination, but sought to obviate the same by striking out Paragraph 11 above quoted, which, as construed, imposed liability for income earned both within and without the state on domestic corporations as well as individuals. However, this record discloses that no liability was attempted to be enforced against domestic corporations during the year 1929, and the Supreme Court of the State of Mississippi is without power or authority to remove the discrimination and require the State Tax Commission to proceed against domestic corporations. The appellant likewise is under no such duty.

In the recent case of *Iowa-Des Moines Nat'l Bank v. E. R. Bennett, Chairman*, Nos. 15 and 16, docket of this Court, October 1931, opinion by Mr. Justice Brandeis, December 14, 1931, the following language was used:

"The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may

be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of Federal law, can not be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co. v. Board of Revision*, supra; *Green v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 514-518; *Chicago Great Western Railway Co. v. Kendall*, 266 U. S. 94, 98; *Sioux City Bridge Co. v. Dakota County*, supra. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. *Montana Nat'l Bank v. Yellowstone County*, supra."

We respectfully submit that the objection is not removed.

We respectfully submit that the judgment appealed from was erroneous for the reasons hereinbefore set out and should be reversed.

Respectfully submitted,

WILLIAM H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellants.

APPENDIX I.

Chapter 124, Vol. 2, Mississippi Code 1930 Annotated

5027. IMPOSITION OF THE TAX.—There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1930 and for each calendar year thereafter upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: On the first $2,000.00 of taxable income, or any part thereof, at the rate of two and one-half per centum; on the next $3,000.00 of taxable income, or any part thereof, at the rate of three and one-half per centum; on the next $10,000.00, or any part thereof, at the rate of four and one-half per centum; on all taxable income in excess of $15,000.00, at the rate of five and one-half per centum.

(2) A like tax is hereby imposed to be assessed, collected and paid annually at the rates specified in this section and as hereinafter provided upon and with respect to the entire net income, from all property owned and from every business, trade or occupation carried on in this state by individuals, corporations partnerships, trusts or estates, not residents of the state of Mississippi.

(3) In the case of taxpayers subject to this tax having a fiscal year ending in 1930, the tax shall be determined by:

(2) Computing for a full year the amount of tax due, and considering the exemptions and credits allowed hereunder.

(b) By computing the amount of tax due for a full year, after considering the credit and exemptions allowed herein.

(c) The same ratio of the tax determined under (a) of this paragraph which the number of months in 1929 bear to the total number of months in the fiscal period;

(d) The same ratio of the tax computed under (b) of this paragraph which the number of months in 1930 bear to the number of months in the fiscal period;

(e) The amount of tax due for the fiscal period shall be the sum determined under (c) of this paragraph plus the amount determined under (d) of this paragraph.

1928 Ex. Ses. ch. 24; 1924 ch. 132.

5028. TAX IS ADDITIONAL PERSONAL DEBT.—The tax herein imposed is in addition to all other taxes imposed by law, and every tax in addition to being a tax against the property, business, trade, profession, or occupation, shall also become from the time it is due and payable, a personal debt from the taxpayer liable to pay the same, to the State of Mississippi.

1924 ch. 132.

5031. NET LOSSES.—(a) As used in this section the term net loss, means only net losses resulting in the operation of any trade or business regularly carried on by the taxpayer, including losses sustained from the sale or other

disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business.

(b) If for any taxable year it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year and if the net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year, the deduction in all cases to be made under regulations prescribed by the commissioner with the approval of the governor.

(c) The benefit of this section shall be allowed to members of partnership and the beneficiaries of any estate or trust, under regulations prescribed by the commissioner with the approval of the governor.

(d) It appears upon the production of evidence satisfactory to the commissioner, that a taxpayer having a fiscal year beginning in 1929 and ending in 1930 after the adoption of this chapter has sustained a net loss during such fiscal year, such taxpayer shall be entitled to the benefits of this section in respect to the same proportion to such net loss which the entire portion of such fiscal year falling within the calendar year 1930 after said adoption is of the entire fiscal year.

(e) The benefits of this section may be allowed for a period of three years from the date such loss is sustained, and not thereafter.

1924 ch. 132.

5033. GROSS INCOME DEFINED.—For the purposes except as otherwise provided for non-resident, the term gross income:

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real, or personal growing out of the ownership or the use of or any interest in such property, also interest, rent, dividends, securities or other transactions of any business carried on for gain or profit or gains, or profits, and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty-five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received.

(b) The term gross income, does not include the following items which shall be exempt from taxation hereunder:

(1) The proceeds of life insurance policies and contracts paid upon the death of the insured.

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract.

(3) The value of property acquired by gift, bequests, devise or descent, but the income from such property shall be included in the gross income.

(4) Interest upon the obligations of the United States or its possessions or securities issued under the provisions of the federal farm loan act of July 17, 1916, or bonds issued by the war finance corporation or the obligations of the state of Mississippi or political subdivisions thereof or of any municipal corporation.

(5) The amounts received through accident or health insurance as compensation for personal injuries or sickness, plus the amount of any damages received for such injuries or such sickness or injury, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

(6) Salaries, wages, and other compensation received from the United States government or officials or employees thereof, including persons in the military or naval forces of the United States.

(7) Income received by any religious donomination or by any institution or trust for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational scientific, literary, library, patriotic, historical or cemetery purposes or for the enforcement of laws relating to children or animals or for two or more of such purposes if such income be used exclusively for carrying out one or more of such purposes.

(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax, or dividends from a national bank or state bank organized under the laws of the state of Mississippi.

(9) In the case of taxpayers other than residents, gross income, includes gross income from sources within this state.

(10) In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policyholder as is paid back or credited to or treated as an abatement of premium of such policyholder within the taxable year.

(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising.

1918 Ex. Ses. ch. 32.

5034. DEDUCTIONS ALLOWED.—(a) In computing the net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business and including rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or business, of property which the taxpayer has not or is not taking title or, in which he has no equity; and all necessary expenses incurred by those

forced to leave home in order to do the work they are employed to do.

(2) All interest paid or accrued during the taxable year on indebtedness, except interest upon indebtedness for the purchase of tax free bonds, or stock in a national bank or bank organized under the laws of the state of Mississippi.

(3) Taxes, other than income taxes, paid or accrued within the taxable year imposed; first by the authority of the United States or any of its possessions; second, by the authority of any state or territory, or any county, school district, drainage or levee district, municipality or other taxing subdivision of any state or territory; third by the authority of any foreign government.

(4) Losses sustained during the taxable year not compensated for by insurance or otherwise, if incurred in trade or business.

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only such transactions in real property or in tangible personal property having an actual situs within the state.

(6) Losses sustained during the taxable year of property not connected with the trade or business of arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

(7) Debts ascertained to be worthless and charged off during the taxable year.

(8) A reasonable allowance for exhaustion, wear and tear of property used in the trade or business, and depreciation upon buildings based upon their reasonable value on March 16th, 1912, if acquired prior thereto, and upon cost if acquired subsequent to this date.

(9) In the case of timber a reasonable allowance for depletion based upon cost; provided it was acquired prior to March 16th, 1912, the fair market value on that date shall be taken in lieu of cost.

(10) Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by law to an amount not in excess of ten per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the commissioner with the approval of the governor. In the case of a non-resident this deduction shall be allowed only as to contributions or gifts made to domestic corporations, or to such vacational rehabilitation fund.

(11) Contributions made within the taxable year to religious, charitable, scientific, or educational associations,

not incorporated, or to persons for exclusive use for religious, charitable, scientific or educational purposes, to be allowed under regulations and rules made by the commissioner with the approval of the governor, not exceeding ten per centum of the taxpayer's net income during the taxable year, without the benefits of this section; and the benefits of this section must be considered in connection with the preceding section in determining the amount of the deduction under this section and the next preceding section, and shall in no event exceed ten per centum of the taxpayer's net income without the benefits of this and the preceding section, provided further no receipt shall be demanded under such rules and regulations unless the commissioner shall have cause to believe that the deductions claimed under this section is (are) fraudulent.

(12) In the case of insurance companies the net additions required by law to be made within the taxable year to reserve funds.

(13) The sums other than dividends, paid within the taxable year on policy and annuity contracts.
1924 ch. 132.

5056. REVISION BY COMMISSIONER.—A taxpayer may apply to the commissioner for revision of the tax assessed against him, at any time within one year from the time of the filing of the return or from the date of the notice of the assessment of any additional tax. The commissioner shall grant a hearing thereon and if, upon such hearing, he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the

fact and adjust the computation of the tax accordingly. The commissioner shall notify the taxpayer of his determination and shall refund to the paxpayer the amount, if any, paid in excess of the tax found by him to be due. If the taxpayer has failed, without good cause, to file a return within the time prescribed by law, or has filed a fradulent return, or having filed an incorrect return has failed, after notice, to file a proper return, the commissioner shall not reduce the tax below the amount for which thetaxpayer is found to be properly assessed.

After the time for making of the returns by taxpayers in each year has passed the state tax commission shall arrange for hearings at the state capitol and give such notice thereof as may be deemed requisite. The expense of such hearings shall be paid out of funds appropriated for the enforcement of this chapter including the traveling expenses of the members of the commission and its necessary employees. The members of the state tax commission shall constitute a quorum at such hearings.

1924 ch. 132.

5057. RREHEARING.—In all hearings before the commission, under this chapter, oral, documentary and other evidence may be introduced by either party and the findings of the commission shall be final unless the taxpayer, or the state, by the attorney-general, shall, within thirty days from the date of the receipt of notice of such findings, file a petition in the chancery court of Hinds County, at the seat of government, requesting a hearing of the case on its merits, which petition shall be a concise statement of the

facts as contended for by the party dissatisfied with the findings of the commission. If the taxpayer be the party filing said petition it shall be accompanied with a bond, to be approved by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. On filing such petition the clerk of the court shall give the opposite party (the attorney-general, if the petition is filed by the taxpayer) notice of the proceedings as required by law. The chancery court shall have jurisdiction to hear and determine said cause, or issue joined, as in other cases. If the petition be filed by the attorney-general for the state, and the taxpayer be not a citizen of Hinds County, on the application of the taxpayer, the suit shall be transferred to the county in this state of which the taxpayer is a citizen. Or the attorney-general may file this petition in the first instance in the chancery court of the county of which such taxpayer is a citizen, which court in either case shall have jurisdiction to hear and determine the case on issues joined therein. Either the state or the taxpayer, or both, shall have the right of appeal to the Supreme Court, as in other cases.

1924 ch. 132.

APPENDIX II.

Constitution of the State of Mississippi

Section 112. Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Prop-

erty shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroads and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.

APPENDIX III.

MISSISSIPPI CODE 1930 ANNOTATED. Chapter 61. REVENUE.

3108. WHAT PROPERTY EXEMPT.—The following shall be exempt from taxation:

. . . . . .

(x) Any and all money on deposit in either national banks, state banks or trust companies, on open account, savings account and time deposit.

1928 ch. 185; 6878; 4251; 3744; 468, 1662; ch. 3 art. 11; ch. 8 art. 2 (1).

APPENDIX IV.

Sec. 28. TAXATION OF PROPERTY, MERCHANTS, PEDDLERS, PRIVILEGES, POLLS, AND INCOMES FROM STOCKS AND BONDS NOT TAXED.—All property real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively for public or

corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the state, shall not be taxed at a rate righer than the ad valorem tax on property. The legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem. All male citizens of this state over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the state.

APPENDIX V.

Sec. 54. CONTRACTORS.—Upon each person who for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any building, highway, street,

sidewalk, bridge, culvert, sewer, or water system, drainage or dredging system, electric or steam railway, reservoir, or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of $5,000.00, at the time of entering into such project, and/or before undertaking the construction or superintending of such contract, a state-wide tax as follows:

When the contract price or estimated cost of such project is over:

$5,000.00, or not more than $10,000.00	$ 20.00
$10,000.00, and not more than $50,000.00	$ 50.00
$50,000.00, and not more than $100,000.00	$100.00
$100,000.00 and not more than $250,000.00	$200.00
$250,000.00 and not more than $500,000.00	$300.00
$500,000.00 and not more than $750,000.00	$400.00
$750,000.00 and not more than $1,000,000.00	$500.00
More than $1,000,000.00	$600.00

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CHARLES ELM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 580.

S. B. LAWRENCE, ET AL., Appellants,

VS.

STATE TAX COMMISSION, ET AL., Appellees.

APPELLANTS' REPLY BRIEF.

W. H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellants.

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In The Supreme Court of The United States

OCTOBER TERM, 1931

No. 580.

S. B. LAWRENCE, ET AL., Appellants,
VS.
STATE TAX COMMISSION, ET AL., Appellees.

APPELLANTS' REPLY BRIEF.

POINT I.

The tax complained of in this case is not a property tax upon income; nor is it a tax upon the money or property constituting the gain, but an excise tax on the activities of the taxpayer which produced the income, all of which took place outside of the State of Mississippi.

The Attorney General of the State of Mississippi, at page 6 of brief, states:

"Appellees concede that the tax imposed on Lawrence, the appellant, is an excise and not a property tax."

While conceding that the tax is an excise tax, counsel insist that it is a direct tax upon the income of the taxpayer which may be measured by income wherever earned.

An excise tax upon the appellant in this case would be

a tax upon the activities of the appellant carried on beyond the borders of the state, and such is the interpretation, scope and effect of the act given to it by the Supreme Court of the State of Mississippi.

If, however, the tax should be held to be one upon the money or property constituting the gain, such a tax would be a property tax, and the Supreme Court of the State of Mississippi has said that the tax is not one of this nature.

It might be helpful to the Court if we should point out the difference between a direct or property tax and an indirect or excise tax.

An excise duty is an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 915, 158 U. S. 601, 39 L. Ed. 1108; *Patton v. Brady*, 22 Sup. Ct. 493, 496, 184 U. S. 608, 46 L. Ed. 713; *Black v. State*, 89 S. W. 522, 526, 113 Wis. 205, 90 Am. St. Rep. 853; *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 851, 62 N. J. Law, 289, 42 L. R. A. 852.

In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, at page 627, 39 L. Ed. 1108, at page 1122, the Court used the following language in respect to direct taxation:

> "The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unappor-

tioned tax, imposed upon all property owners as a body for and in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?"

In the case an excise tax is defined in the following language: (158 U. S. 622, 39 Law Ed. 1120)

"Cooley, on Taxation, page 3, says that the word 'duty' ordinarily 'means an indirect tax, imposed on the importation, exportation, or consumption of goods;' having 'a broader meaning than custom, which is a duty imposed on imports or exports;' that 'the term impost also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.'

"In the Constitution, the words 'duties, imposts and excises' are put in antithesis to direct taxes. Governor Morris recognized this in his remarks in modifying his celebrated motion, as

did Wilson in approving of the motion as modified. 5 Elliott's Debates, 302."

In the case of *Flint v. Stone Tracy Co.* 220 U. S. 107, at page 151, 55 Law Ed. 389, at page 413, used the following language:

> "Duties and impost are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th ed. 680.
>
> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organizations; or, when applied to insurance companies, for doing the business of such companies. As was said in the Thomas Case, 192 U. S. supra, the requirement to pay such taxes involves the exercise of 'privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

In the case of *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1, at page 14, 60 Law Ed. page 493, at page 500, the court used the following language:

> "Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand,

that the tax was not in the class of direct taxes requiring apportionment, because it was not levied directly on property because of its ownership, but rather on its use, and was therefore an excise, duty, or impost; and on the other, that in any event the class of direct taxes included only taxes directly levied on real estate because of its ownership."

In the case of *Spokane & Eastern Trust Co. v. Spokane* 70 Wash. 48, 126 Pacific, 54, it is said that an "excise" is a tax upon a pursuit, trade or occupation, generally taking the form of an axaction for a license fee to pursue the particular occupation. See Ruling Case Law, Vol. 26, page 236.

The Supreme Court of the State of Mississippi, has with unanimity held that wherever income is derived from or connected with the activities of the owner that the tax is an excise tax and not a property tax. There would be insuperable objections under the Mississippi Constitution to the validity and enforcement of this tax if it were a property tax.

Section 112 of the Constitution of the State of Mississippi, (Appendix to original brief, page 58) provides taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. The tax in question could not be sustained as property tax because in *Thompson v. Kreutzer*, 112 Miss. 165, and *Thompson v. McLeod*, 112 Miss. 383, 73, So. 193, the court held that the Constitution of the State of Mississippi would not permit a tax

upon the mere ownership of property or use thereof without gain.

In the case of *Chicago R. I. & P. R. R. Co. v. Robertson, Revenue Agent,* 122 Miss. 417, 84 So. 449, there was imposed upon the owners of freight cars used by any carrier in transportation a sum equal to 3 per cent of the gross earnings thereof in lieu of all other taxes. The court pointed out that a lieu tax violated Section 112 of the Constitution of the State of Mississippi. The court further decided that the tax was a property tax and that Section 112 forbade the tax in question, using the following language:

> "this requirement being twice set forth therein. In order that the equality of taxation contemplated by this section may exist, not only must all property be assessed at its true value, no substitute therefor being permissible (*Thompson v. Kreutzer,* 112 Miss. 165, 72 So. 891), but there must be no discrimination in rates between different species of property. All property must be taxed at the same rate on its true value. Neither of these requirements are here present, for gross earnings from the cars sought to be taxed are substitued for their true value, and the rate of taxation, three per cent., is different from that imposed on other property; the rate on other property for the year 1912 being six mills on the dollar. Chapter 87, Laws of 1912."

Therefore, if the tax complained of was a property tax, it would be void under Section 112 of the Constitution of the State of Mississippi; void, first, because the tax would not be equal and uniform; a person with an income of

$5,000.00 would pay one rate of taxation, and a person with an income of $50,000.00 would pay an entirely different rate of taxation. Not only that, but as the court pointed out the state tax on other classes of property in the year 1912 did not exceed six mills, whereas the tax in question was three per cent. on the gross income. The same argument would apply to this case. The tax imposed would equal five per cent of the value of the property; that is to say, the income, and yet the state levy for the year 1926 to 1930 did not exceed eight mills. (See Appendix No. 1 hereto.) We make the foregoing statement of law in the State of Mississippi in order that we may point out to the court why there were insuperable objections to the tax in question being denominated a property tax.

The question was first presented to the Supreme Court of the State of Mississippi in the case of *Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748. In that case the appellant operated a retail grocery business, and income sought to be recovered was derived from the sale of merchandise. The question was squarely put up to the Supreme Court of the State of Mississippi in that case as to whether the tax was a property tax or an income tax. If the same should be held to be a property tax the act was invalid under Section 112 of the Mississippi State Constitution for all the reasons pointed out in the case of *C. R. I. & P. R. R. Co. v. Robertson*, 122 Miss. 417, 84 So. 449, as well as other sections of the Constitution to be hereinafter referred to. Therefore, the Supreme Court of the State of Mississippi was called upon to give the most careful and elaborate attention to the subject matter. The court was

careful to point out that the tax imposed was an excise tax arising out of and connected with the activities of the owner and not a property tax. The court used the following language:

> "But a tax on income to be paid by the recipient thereof without reference to whether he has invested, spent, or wasted it, as is the tax here in question, is not on the specific property from which the income was received irrespective of the person of the recipient, neither is a tax on the person irrespective of property; for no definition of income can be framed under which it can be dissociated from the activities of the person who produced or received it, so that a tax on income necessarily includes among its elements the production or receipt of property. (*State v. Wisconson Tax Commission*, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470), *and to that extent is a tax on the performance of an act resulting in gain to the person performing it, and the rule is, and was when section* 112 *of the state Constitution was adopted, that when the tax is imposed on the performance of an act, it will not be classified as a tax on property, although it is proportioned in amounts to the value of the property used in connection with or produced by the act which is taxed.*
>
> "*Income is necessarily the product of the joint efforts of the state and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive, and enjoy it, and a tax thereon in the last analysis is simply a portion cut from the income and appropriated by the state as its share thereof, and, while a tax on income includes some of the*

elements both of a tax on property and a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise, and should be enforced as such unless and until so to do would accomplish the result which section 112 *of the Constitution was adopted to prevent, which is to prevent discrimination in the taxation of property, so that all property shall bear its due proportion of the burdens of government.*

"This was the theory on which the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and 158 U. S. 601, 15 Sup. Ct. 912. 39 L. Ed. 1108, was decided, for, as pointed out in *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414:

" 'The conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested

personal property, that is, income from 'professions, trades, employments, or vocations,' . . . its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past.'"

The court did state that a tax on income includes some of the elements of a tax on property and a tax on persons. In that case the court was confronted with the fact that the income arose from the sale of personal property, and that is what the court meant by holding that the tax had some of the elements of a tax on property. But in view of the fact that the income arose from the activities of the owner, the court said "for it is generically and necessarily an excise tax and should be enforced as such unless and until so to do would accomplish the result which section 112 of the Constitution was adopted to prevent." The court was careful to point out that the distinguishing feature between a property tax and an excise tax involved the activities of the owner. In this case we are not presented with one where the income arose from the sale of either real or personal property in Mississippi. In this case, therefore, the tax has no element whatsoever of a property tax. This tax is exclusively an excise tax upon the activities of the owner which took place outside of the State of Mississippi.

The Supreme Court of the State of Mississippi had occasion to review the case again in the case of *State ex rel. Knox, Attorney General v. Gulf, Mobile & Northern Railroad Co.* 104 So. 689, 138 Miss. 70. In that case the income

arose from the transportation of freight on the part of a Mississippi corporation and income derived as rent and from the proceeds of the sale of personal property. The statute as amended in that case said that the tax was a tax upon property, and the Supreme Court of the State of Mississippi was confronted not only with section 112 of the Constitution but with the legislative declaration that the tax was a property tax. This court, however, re-affirmed the case of *Hattiesburg Grocery Co. v. Robertson, supra,* using the folowing language:

> "The appellees' contention in this connection is that a tax on income derived from property is a tax on the property from which the income is derived, and, as the tax here imposed is on all income, it was, in so far as it affects income from property, a tax on the property from which the income was derived, which property the Constitution permits to be taxed only in proportion and according to its true value.
>
> *"This contention is ruled by Hattiesburg Grocery Co. v. Robertson,* 126 *Miss.* 34, 88 *So.* 4, 25 *A. L. R.* 748, *wherein this court, after mature consideration, held that a tax on income is an excise and is not a tax on the property from which the income may have been derived. As was there pointed out a tax on income from property includes some of the elements both of a tax on property and of a tax on persons, and cannot be classified as strictly a tax on either alone. Property of itself alone cannot produce income, but must be used or dealt with in some way by a person, before gain or income can be derived therefrom, and no definition of income though derived from*

property, can be framed which does not include the activities of the person by whom it was produced, received, or enjoyed."

In respect to the claim of appellees' counsel in this case, that the tax was not one directly upon the money constituting the gain, the Supreme Court of the State of Mississippi expressly held otherwise, at page 101, using the following language:

> "The appellees do not contend that a tax on income is a tax on property in the sense that it is a tax on the money or property which constitutes the gain or revenue of a person and on the aggregate of which the amount of his income is determined. That it is not such a tax, see *Hattiesburg Grocery Co. v. Robertson,* 126 Miss. 55, 88 So. 4, 25 A. L. R. 748; *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759; Id., 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108; *Brushaber v. Union P. R. Co.,* 240 U. S. 1, 36 S. Ct., 236, 60 L. Ed. 493, L. R. A. 1917B, 713."

Again, in this case a concurring opinion was delivered by Mr. Justice Holden, page 109, wherein the following language was used:

> "The income tax law in this state was upheld and declared valid by this court in the case of *Hattiesburg Grocery Co. v. Robertson,* 126 Miss. 55, 88 So. 4, 25 A. L. R. 748, about five years ago. That decision has not been overruled by any court nor annulled by the legislature; and as it positively announces the law of Mississippi, it is the duty of this court to follow it in the case now before us.

"The income tax in the instant case is the same in principle and purpose as the income tax law passed upon and held valid in the Hattiesburg case, supra. *It is not a property tax, but is an excise income tax.* This has been already decided, and is too plain for discussion."

In sustaining the validity of this income tax the court not only had to point to section 112 of the State Constitution, but likewise to section 135 which created the constitutional office of the assessor and made it the duty of such officer to assess property for taxation. The section is made Appendix 2 hereto.

In the case of *Knox, Attorney General, v. Railroad Co.*, 138 Miss. 70, supra, at page 107, in respect to this section of the Constitution the court used the following language:

"As to section 135 of the state Constitution:

"This section creates the office of tax assessor, and the appellees' contention is that the ascertainment of the amount of a person's income for the purpose of taxing it is an assessment thereof, and can be made, under this section of the Constitution, only by the regular tax assessor. This objection to the statute was disposed of in *Enochs v. State*, 133 Miss. at page 143, 97 So. 537, wherein it was said:

" 'The implied requirement of section 135 of the state Constitution, that taxes shall be assessed by the assessor and collected by the sheriff, one of whose duties is to collect taxes (as heretofore construed by this court), has no application to privilege taxes, but only to such as can only

be fixed by an assessment of, and is primarily a charge against property'—citing *State v. Adler*, 68 Miss. 487, 9 So. 645; *Thibedeaux v. State*, 69 Miss. 683, 13 So. 352.

"An income tax as hereinbefore pointed out is an excise and not a property tax."

In the case of *State v. Tonella*, 70 Miss. 701, the court held that as to a property tax the liability could only be created as a result of an assessment by the constitutional officer whose duties could not be dispensed with by the legislature. But not only that, if the tax had been held to be a property tax, not only was it necessary that the property be assessed according to its true value, but the assessment of property at its true value had reference to the value at which other property was uniformly and intentionally valued by taxing officers.

In *Green v. Louisville & I. Railroad Co.*, 244 U. S. 499, at page 514-516, 61 L. Ed. 1280, at page 1289, the court used the following language:

"It is equally plain that it makes no difference what basis of valuation—that is, that percentage of full value—may be adopted, provided it be applied to all alike. The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. (Under Sec.

> 171 of the Constitution, the rate of taxation may be varied by the general assembly from year to year, according to requirements.) Therefore, the principal if not the sole reason for adopting 'fair cash value' as the standard for valuation is as a convenient means to an end,—the end being equal taxation. But if the standard be systematically departed from with respect to certain class of property, while applied as to other property, it does not serve, but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value can not be supreme in all cases, but must yield where necessary to avoid defeating its own purpose."

As to such valuation, the Supreme Court of the State of Mississippi had expressly admitted that the assessing officers universally assesses property in the State of Mississippi at a lower level than its true value.

In the case of *Knox, Attorney General, v. Southern Paper Co.*, 108 So. 288, 143 Miss. 870, at page 879, the court used the following language:

> *"It is a matter of common knowledge in this state that the assessing officers of the state systematically and universally assesses property in the state at a lower level than its true value."*

In the case of *Hanover Fire Insurance Co. v. Carr*, 272 U. S. 494, 71 L. Ed. 372, at pages 514-517, the Court held that where a tax was levied upon the premiums of foreign fire insurance companies and construed by the court to be a property tax value should not exceed that at which the other personal property was uniformly and customarily

assessed. Therefore, if the Supreme Court of the State of Mississippi had held this tax to be a property tax the entire scheme of income taxation would have been upset, and we respectfully submit that a tax directly upon the income itself in the hands of the taxpayer would be a direct and/or property tax.

In Appellees' brief, at page 7, the following rule is invoked:

> "In those cases relied upon by appellees the *courts hold that where the tax is not a property tax but is an excise tax, an income tax may be levied even though the income is earned by the taxpayer beyond the confines of the state.*"

It is very true, as stated by counsel, that the Mississippi cases cited are an authority for that announcement. The objections which we make to the constitutionality of the statute in question are based upon the two Mississippi cases, *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4; *State v. Railroad Co.*, 138 Miss. 70, 104 So. 689, it being our position that the construction given by the Supreme Court of the State of Mississippi to the statute in question has the effect of imposing liability for an excise tax upon income earned in carrying on an occupation beyond the limits of the state. The prerogative of the sovereign pertains to the national authority. *Blackmar vs. United States*, 424 U. S. p..... Counsel concede that the tax is an excise tax, and that the Supreme Court of the State of Mississippi in interpreting its own statutes has given such scope and effect thereto. Counsel are in error, however, in their citation of authorities alleged to sustain the position contended for. A number of Massachusetts cases are cited. These cases are not at all in point,

because the tax imposed under the Massachusetts statute is a property tax and not an excise tax. See *Trefry v. Putnam*, 227 Mass. 522, 116 N E. 904, at page 910.

In the case of *Hart v. Tax Commission*, 240 Mass. 37, 132 N. E. 621, the court held that the tax was laid directly on the income of property and was a tax upon the property itself. The court held, however, that since the tax was measured by the income of the preceding year, and that the taxpayer did not live in Massachusetts during such year, no tax could be imposed therefor, using the following language:

> "We realize, also, that the law as to the situs of income for the purposes of taxation is not yet developed. But in view of the construction placed by this court upon the income tax of 1916, and the fact that this commonwealth had no jurisdiction over the person, property or business of the complainant during the year 1917, we are of opinion that the tax in question was invalid. On the facts disclosed by this record the complainant is entitled to the abatement claimed. In accordance with the terms of the report, judgment is to be entered in her favor in the sum of $840.77, with interest from February 28, 1920; and it is so ordered."

In the case of *Loevy v. Long, Commissioner*, 245 Mass. 174, 139 N. E. 496, (erroneously cited by appellee, *Anderson v. Savage*), the Supreme Court of Massachusetts held that where a taxpayer lived in the state any part of the year; that is to say, lived in the state nine months and out of the state three months, the income for the year should be treated as a unit in fixing the basis of the tax for the preceding year.

In the case of *Kennedy v. Commissioner of Corporation and Taxation*, ... Mass. ....., 152 N. E. 747, the Supreme Court of Massachusetts realized that the rule was harmful and expressly departed therefrom, using the following language at page 749:

> "This construction avoids highly difficult constitutional questions which would be encountered if the sections were interpreted to subject a person removing to the Commonwealth in the latter part of any year to taxation on income received in a foreign jurisdiction while an inhabitant thereof, and thus at a time when such person derived no protection from our laws and owed them no duty. These constitutional objections have been strongly urged at the bar but need not be discussed nor decided in view of the interpretation placed on the statute. This is in accord with the principle frequently declared by the United States Supreme Court that—'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score.' *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, (36 S. Ct. 658, 659, 60 L. Ed. 1061); *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, 408, (29 S. Ct. 527, 52 L. Ed. 836); *Bender v. Barnett*, 255 U. S. 224, (41 S. Ct. 271, 65 L. Ed. 597). *Panama R. Co. v. Johnson*, 264 U. S. 375, 390, (44 S. Ct. 391, 68 L. Ed. 748); *Lewellyn v. Frick*, 268 U. S. 238, 251, 45 S. Ct. 487, 69 L. Ed. 934."

The court said that in the case of *Loevy v. Long, Commissioner*, supra, the question was not properly presented.

In the recent case of *Hutchins v. Commissioner*, ... Mass. ....., 172 N. E. 605, the Supreme Court of Massachusetts was presented with a case where trustees residing in Massachusetts were administering estates having a permanent situs in other states. An effort was made to tax the income arising therefrom in the State of Massachusetts. The Supreme Court of Massachusetts declined to extend the rule so as to tax the income arising from such estates, using at page 609 the following language:

> "In our opinion it follows that there was no jurisdiction to levy the taxes on the gains of the two New York trusts. For discussion of cognate questions, See *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Frick v. Pennsylvania*, 268 U. S. 473, 488-489, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316; *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374; *Blodgett v. Silberman*, 277 U. S. 1, 12-18, 48 S. Ct. 410, 72 L. Ed. 749; *Brooke v. Norfolk*, 277 U. S. 27, 29, 48 S. Ct. 422, 72 L. Ed. 767."

We have in our original brief directed the attention of the Court to the distinguishing features which characterize the case of *Maguire v. Trefry*, 253 U. S. 12, 64 L. Ed. 738. (Original Brief, page 38).

Counsel's brief, page 20, cites the case of *Crescent Manufacturing Co. v. Tax Commissioner*, (S.C.), 124 S. E. 761. It is not possible for us to tell from the report of the case whether the tax was a property tax or an excise tax. However, the question under review by the court was the

construction of its own statute; the power of the legislature of South Carolina to place an excise tax on income earned beyond the state was not presented to the court.

Counsel cite the case of *Royster Guano Co. v. Virginia*, 253 U. S. 412, 64 L. Ed. 989. In that case, the State of Virginia undertook to tax domestic corporations on net income received from sources both within and without the state, and to exempt certain other domestic corporations from taxation on income earned out of the state where no income was earned in the state. This Court held that the statute was discriminatory, and that the tax for income earned without the state could not be enforced against domestic corporations which earned income within the state. The question as to the right of the state to tax the corporation vel non for income earned beyond the limits of the state as an excise tax does not appear to have been presented to the Court. The tax was invalidated on other grounds.

The case of *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135, cited by counsel for the appellees, is not at all in point. In that case the corporation was carrying on a manufacturing business in the State of Wisconsin. The product of its factory was sold in Wisconsin and shipped out of the state in interstate commerce. The tax was a net tax and the question presented was as to whether or not the tax was a burden upon interstate commerce. This court held that it was not that since the tax was a net tax, interstate commerce was only remotely affected. However, the court expressly held that as to income exclusively earned beyond the limits of the State of

Wisconsin no liability existed therefor. See the case in the lower court, *United States Glue Co. v. Oak Creek*, 161 Wis. 211, 153 N. W. 241, 1918A, Ann. Cas. at page 421.

In our original brief at page 34, we directed the court's attention to the case of *Arpin v. Eberhardt*, 147 N. W. 1016. In that case, it appeared that the Wisconsin statute excluded from the income tax that earned outside the state except as to intangibles. We direct the attention of the court to the suggestion that the legislature of Wisconsin was doubtless of the opinion that except as to intangibles it could not tax the income of a resident of the state exclusively earned beyond the limits of the state.

POINT II.

The Supreme Court of the State of Mississippi has construed the act as applicable to income earned in an occupation carried on wholly within the State of Tennessee.

Counsel for appellees in brief take the position that the appellant is liable for the tax whether the same be called an excise tax or a direct tax on income. We desire to distinguish two cases cited by opposing counsel upon that point.

Counsel cite the case of *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445. In that case, a resident of Illinois carried on an occupation in the State of Oklahoma, and was sought to be charged in the State of Oklahoma with an excise tax thereupon. The Supreme Court of the State of Oklahoma held the taxpayer liable, and on appeal to this court the taxpayer insisted that the tax sought to be imposed was a per-

sonal tax as to citizens, but a property as to non-residents. This court held that since the income was earned in the State of Oklahoma and was held to be valid therein, that an analysis of the nature of the tax was not relevant, to tax payer was liable in Oklahoma whether the tax was an excise tax or property tax and no federal question was presented thereby. The court used in addition to the language quotes in appellees' brief the following, at page 458:

> "The practical burden of a tax imposed upon the net income derived by a nonresident from a business carried on within the State certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen."

Again counsel cite *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 65, L. Ed. 165. In that case the same question was presented as to income earned within the state; it did not make any difference whether it was an excise tax or a property tax, and the Supreme Court of the state was the final judge. The Court used the following language:

> "Second. It is contended that the tax violates the 14th Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the state. In considering this objection, we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the state, or a direct tax upon that income; for 'the argument upon analysis resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised

under the Federal Constitution.' *Shaffer v. Carter*, 252 U. S. 37, 55, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221."

The Supreme Court of the State of Mississippi holds:

(a) That the tax in question is not a tax on the money or property constituting the gain. See 138 Miss. at page 101;

(b) That the act has an extra-territorial effect in that the taxpayer is subjected to liability for gain earned beyond the limits of the state. In respect to it, in 138 Miss. page 108, the court used the following language:

"As to the extra-territorial effect of the act:

"The tax imposed on residents of the state and on domestic corporations is on the whole of their income, whether derived from business within or without the state, and the contention is that the tax is void in so far as it covers income derived from business without the state. The question here presented was ruled against the appellees by the supreme court of the United State in *Maguire v. Trefry*, 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739, and *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445."

This rule was affirmed by the Supreme Court of the State of Mississippi in the instant case, *Lawrence v. Mississippi State Tax Commission*, 137 So. 503. At page 505, the court used the following language:

"If chapter 32 of Laws of state of Mississippi, Extraordinary Session 1928, is constitutional, of

> course, the appellant is subject to the tax; if such act is unconstitutional, then section 11 of chapter 132, laws of 1924, would remain in force as though the amendment had not been made, and under the said chapter both individuals and domestic corporations would be subject to income tax on the income earned outside of the state as well as income earned within the state. *State v. Gulf, M. & N. R. Co.*, 138 Miss. 70, 104 So. 689, and authorities therein cited."

The Supreme Court of the State of Mississippi has therefore made it perfectly clear that the tax is an excise tax, and that it has extra-territorial effect, that the tax is not a property tax, nor a tax upon the property or money constituting the gain, but is one upon the activities of the owner. This construction of the statute, of course, is binding upon the State of Mississippi as to its scope and effect.

In *Twining v. New Jersey*, 211 U. S. 78, 53 L. Ed. 97, this court used the following language:

> "The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state. Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676, *Scott v. McNeal*, 154, U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581."

And in view of the fact that if the act should be held to be property tax it would violate Section 112 of the Constitution of the State of Mississippi. No other construction of the act could reasonably be anticipated on the part of the Supreme Court of the State.

In the case of *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessment of the State of New Jersey*, 280 U. S. 338, 74 L. Ed. 463, at page 347 (280 U. S.) this court used the following language:

> "And, as under the state Constitution, property is required to be assessed by uniform rules according to its true value, the legislature may not reasonably be deemed to have intended direct valuation and assessment of some of the property at local rates and the measurement of the value of other elements of the plant by percentage of gross earnings increasing on a sliding scale from 2 per cent in 1917 to 5 per cent in 1920 and thereafter. *North Jersey Street R. Co. v. Jersey City* (Supreme Court) 73 N. J. L. 481, 63 Atl. 833; (court of errors and appeals) 74 N. J. L. 761, 67 Atl. 33."

In the case of *Louisville Gas & Electric Co. v. Coleman*, 72 L. ed. page 770, 220 U. S., 732, this court at page 36, used the following language:

> "The state court of appeals, in disposing of the contention that the statute violated the state Constitution, held that the tax imposed was not a property tax but a privilege tax, that is, a tax imposed upon the privilege of recording mortgages, etc., the payment of which, it was said, was entirely optional with the owners or holders thereof. This determination of the state court, in so far as it affects the challenge under the state Constitution, we accept as conclusive, in accordance with the well-settled rule. *Merchants Bank v. Pennsylvania*, 167 U. S. 461, 462, 42 L. Ed. 236, 237, 17 Sup. Ct. Rep. 829."

In determining, of course, the validity of the act as applied to the 14th Amendment of the Constitution of the United States, reference must be had to the practical effect of the enforcement thereof. *Panhandle Oil Co. v. Miss.* 277 U. S. 218, 72 L. Ed. 857; *Wagner v. Covington*, 267 U. S. 101, 64 L. Ed. 157.

The practical effect of the act in its enforcement is to levy an excise tax upon income earned in carrying on an occupation beyond the limits of the state. That is what the Supreme Court of the State of Mississippi says the act means, and such is the practical effect given to the act in the enforcement thereof. The rule is well settled that this court is bound by the construction of the Supreme Court of the State of Mississippi as to the scope, meaning and application of the act. But if the tax as construed and enforced by the Supreme Court of the State of Mississippi infringes upon some constitutional right, this court will not be bound by the characterization given to the tax by the state Supreme Court.

In the case of *Hanover Fire Insurance Co. v. Carr*, 71 L. ed. 380, 272 U. S. 494, this court used the following language at page 509:

> "It is true that the interpretation put upon such a tax law of a state by its supreme court is binding upon this court as to its meaning, but it is not true that this court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this court

in *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, at page 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the 14th Amendment.

"Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance rather than the (510) form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

"This view has been upheld in many cases. *Western U. Teleg. Co. v. Kansas*, 216 U. S., 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190, *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. ed. 297, 43 Sup. Ct. Rep. 125.

Other cases directly in point are: *MacAllen Co. v. Massachusetts*, 279 U. S. 620, 73 L. ed. 874; *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessments*, 280 U. S. 338, 74 L. ed. 463; *Storaasli v. Minnesota*, 283 U. S. 57, 75 L. Ed. 839.

While the foregoing rule is thoroughly established, the application thereof presents no difficulty in this case for

the reason that the Supreme Court of the State of Mississippi has given that act extra-territorial effect. So, regardless of what term may be applied to the act the same violates the 14th Amendment to the Constitution of the United States.

In addition to the cases cited upon this point in our original brief, we direct the attention of the court to the recent case of *MacAllen Co. v. Massachusetts*, 279, U. S. 620, 73 L. Ed. 879, where at page 625 the court used the following language:

> "The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name or by using some form of words, can take away our duty to consider its nature and effect, *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, 237, 35 Sup. Ct. Rep. 27; *Galveston, H. & S. A. R. Co. v.* (626) *Texas*, 210 U. S. 217, 52 L. Ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

The difference between the state and national power in respect to taxing power, stated, *Cook v. Tait*, 265 U. S. 47, 68 L. Ed. 895; *U. S. v. Bennett*, 232 U. S. 299, 58 L. Ed. 612.

POINT III.

Even if the tax should be held to be a property tax the tax violates the Constitution of the United States.

Even if the act should be held to be a property tax, the act as construed and enforced in this case would violate the 14th Amendment of the Constitution of the United States for the following reasons:

1. The property of the appellant, Lawrence, would be taxed at 100 per cent of its value, whereas the Supreme Court of the State of Mississippi has authoritatively stated that other property during the same period of time was customarily assessed at much less than its actual value.

2. The tax imposed upon the appellants' property was at the rate of approximately 5 per cent of the net earned income, whereas the State of Mississippi does not assess other property at exceeding eight mills on the dollar.

3. The tax is on a graduated scale which, if enforced as a property tax, would be unequal and discriminatory as against appellants.

Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, *Greene v. Railroad Co.* 244 U. S. 499, 61 L. Ed. 1280; *Hines Yellow Pine Trustees v. Stewart,* C. C. A. 5, 46 Fed. 910. certiorari denied, 283 U. S. ....., 75, L. Ed. 1466; *Knox, Attorney General v. Southern Paper Co.* 108 U. S. 288, 143, Miss. 87.

POINT IV.

The Activities of Appellant, While Engaged in Constructing Highways in Tennessee, Not a Chose in Action.

We have cited in our original brief on the question of the lack of power of the state to extend its taxing authority into other state cases dealing with intangibles, the situs of which follows the domicile of the owner, but the nonliability of the appellant in this case for an excise tax on earnings arising from an occupation carried on in Tennessee rests upon even a stronger basis.

The tax in this case is not a tax upon the contract which the appellant Lawrence made in the State of Tennessee to construct highways. Such would be a property tax and not an excise tax, and would be subject to all of the insuperable constitutional objections under the laws of the State of Mississippi to which we have heretofore directed the attention of the court. The Tax in this case being an excise tax related to the activities of the owner, is one directly imposed upon the work in which the appellant was engaged in the State of Tennessee.

In the case of *Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, at page 52, the court said:

> *"Income is necessarily the product of the joint efforts of the state and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive and enjoy it."*

This is not a case like that of *First National Bank of Boston v. Maine*, 284 U. S. page....., where the court held that stock in a Maine corporation owned by citizens in Massachusetts was only subject to an excise tax in Massachusetts at the domicile of the owner; nor is it a case like *Safety Deposit Trust Co. v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, where intangible property was placed in the hands of trustees outside of the State of Virginia where the beneficiaries resided. The court held that the income therefrom could not be taxed by the State of Virginia, because the intangibles had acquired a permanent situs beyond the jurisdiction of the state. In this case, not only was the contract made in the State of Tennessee, but the actual building of the highways took place there. That is to say, the

thing which was taxed, the occupation which produced the income, was in Tennessee and could not be attributed to the domicile of the contractor. After the taxpayer earns his money and collects it, as long as the same remains in an intanglible form, the money, or an intangible investment which it may find its way into, would be subject to an ad valorem or property tax in the State of Mississippi, and the income arising therefrom would be subject to an excise tax in the State of Mississippi. In this case, however, the income has not arisen from any intangible situated either in the state or out of the state. Counsel suggests that there is nothing in the record to show that the taxpayer owned any equipment in the State of Tennessee with which the highways were constructed. This is an immaterial fact; whether the taxpayer owned the equipment, borrowed it or leased it, the use thereof in the construction of the highways which produced the gain and profit and took place beyond the limits of the state.

Counsel say that there is nothing to show that the appellant paid the privilege tax in the State of Tennessee which the statutes require for the construction of highways. The truth about the matter is that the State of Mississippi has not the right to tax an occupation carried on in Tennessee by placing an excise tax thereupon whether the State of Tennessee taxes the occupation itself or not. The exaction of a license by the State of Tennessee is not a material injury; but since liability therefor is imposed, there arises a presumption which is well nigh conclusive that the taxpayer has paid the same. Certainly, however, the taxpayer carried on an occupation within the

State of Tennessee, was protected by its laws, and incurred liability therefor. We are informed, since the writing of our original brief, that in the meantime the State of Tennessee has imposed an excise tax in the nature of an income tax upon the same occupation, but we have been unable to obtain a copy thereof.

Appellees' counsel take the position that if appellants' theory of the case is correct, a resident of Mississippi might take intangible property, like money or notes, deposit the same in another state, and escape taxation thereupon, but such is not the appellants' position at all. Distinction must be drawn between an excise tax and a property tax. If Mr. Lawrence should earn $50,000.00 in Tennessee and place the same in a bank, either in Mississippi or in Tennessee, such money would become subject to an ad valorem or property tax, if liable therefor; *Fidelity Trust Co. v. City of Louisville*, 245 U. S. 54, 62 L. Ed. 145; and the regular state levy, shown not to exceed eight mills, would be imposed thereupon. This, however, would be a property tax, and we have pointed out to Your Honors, Appendix 3, page 59, of our original brief, that money on deposit in a bank is exempt from ad valorem or property taxation. But suppose that the taxpayer deposited this money in a Tennessee bank and earned interest therefrom. Since the money is an intangible chose in action, and its situs would follow the domicile of the owner, the interest earned on the money would be subject to an excise tax by the State of Mississippi just as if the taxpayer had bonds, notes or other securities in a vault in the State of Tennessee; the income thereupon would be subject to an excise tax in the State

of Mississippi, but the tax on such income would not be a property tax. According to the decisions of the State of Mississippi, the tax would be an excise tax. So, any stocks, bonds, notes or securities which the taxpayer might deposit in a vault in Tennessee would be subject to a property tax by the State of Mississippi for the reason that the situs thereof would follow that of the owner, and, if taxable in the state, the fact that the same was situated in Tennessee would not make the property any less taxable, but the tax would be an ad valorem or property tax, and not an excise tax. However, the building of highways in Tennessee by the appellant is not a chose in action which follows the domicile of the owner, but a tax upon the income derived from such occupation, is a tax upon the activities of the appellant while engaged therein, and not a tax upon the income from tangibles situated in the State of Tennessee. In other words, the act of the appellant in following the occupation of building highways in Tennessee is not the same as the position of a resident of the State of Mississippi receiving income from intangible securities placed in a vault in Tennessee, which at the same time follow the domicile of the owner. The legal situation of the appellant, while following the occupation of building highways in Tennessee is more nearly related to a person owning real estate or tangible personal property in Tennessee, the income of which is sought to be taxed as an excise in Mississippi. We are not asking the court to hold that the State of Mississippi could not enforce an excise tax against the increment arising from intangibles, although located in another state. Such intangibles would follow the domicile of the owner, We are complaining, however, of a construction of the stat-

ute which justifies the levying of an excise tax upon an occupation carried on beyond the limits of the state.

POINT V.

DOMESTIC CORPORATIONS NOT LIABLE FOR THE TAX.

We could add little to the argument contained in our original brief upon this branch of the case. Counsel cite, however, *Franklin v. Carter*, C. C. A. 10, 51 Fed. (2) 345. The court in that case justified the classification because stockholders would be required to pay the tax from dividends declared by the corporation, and that, therefore, double liability would be created and that the classification was justified in order to prevent this duplication. In the Mississippi statute, however, this duplication would not take place. If the corporation paid the tax the stockholders would not be required to return the dividends declared.

Subdivision 8, paragraph (b), Section 5033, being part of Appendix 1 of our original brief, at page 53 thereof, contains the following provision:

> "Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax, or dividends from a national bank or state bank organized under the laws of the state of Mississippi."

Therefore, the classification does not classify in the present instance. Counsel say, however, that the Supreme Court of Mississippi decided that if that portion of the act

relieving domestic corporations from liability created undue discrimination (which it did not decide, however) in such case domestic corporations would be liable. We call Your Honors attention, however, to the fact that, according to the admitted allegations of the bill of complaint, the state through its taxing body relieved domestic corporations of such liability for the year 1929, and the Supreme Court of the State of Mississippi of itself could not compel it to impose the liability so that regardless of what the Supreme Court of the State of Mississippi may have said in this case, if the classification is not justifiable the Supreme Court of the State of Mississippi is powerless to remove the discrimination, and such discrimination not only exists but has been approved by the judgment of the Supreme Court of the State of Mississippi in this case.

We respectfully submit that the judgment appealed from was erroneous and should be reversed.

Respectfuly submitted,

W. H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellants.

APPENDIX I.

Chapter 16, *Mississippi Legislature, Extraordinary Session* 1928.

Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That a state ad valorem tax of six mills on each dollar of assessed valuation for the year 1928 and a tax of six mills on each dollar of assessed valuation for the year 1929 is hereby levied on all taxable property in the State of Mississippi.

Chapter 161, *Mississippi Laws of* 1930.

Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That a state ad valorem tax of eight mills on the dollar for the year 1930 and eight mills on the dollar for the year 1931 is hereby levied on all the taxable property in the State of Mississippi.

Section 2. That this act shall take effect and be in force from and after its passage.

APPENDIX NO. II.

Section 135 *Constitution of the State of Mississippi.*

"There shall be a sheriff, coroner, assessor and surveyor for each county to be selected as elsewhere provided herein, who shall hold their office for four years. The sheriff shall be ineligible to immediately succeed himself in office. The duties heretofore imposed on the county treasurer shall be discharged by some person or persons selected as required by law."

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 580

S. B. LAWRENCE, et al., Appellants

vs.

STATE TAX COMMISSION, et al.

SUPPLEMENTAL REFERENCES FOR APPELLANTS

WILLIAM H. WATKINS,
R. W. HEIDELBERG,
Attorneys for Appellant.

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State Tax Commision et al.

SUPPLEMENTAL REFERENCES FOR APPELLANTS

I.

Since submitting brief in this case, our attention has been directed to an article upon the subject matter written by Joseph H. Beale of the Harvard Law School for the Harvard Law Review in April, 1919, entitled Jurisdiction to Tax. The following language is used:

"VII. EXCISE TAX.

"Not only persons and property may be taxed, but also the privilege of acting within the state, or of taking any benefit from the law of the state. In short, whatever the state may refuse or forbid, it may grant or allow only upon the payment of

a fee to the state in return for the privilege; a license fee, or excise tax. (Nathan v. Louisiana, 8 How. (U. S.), 73 (1850); Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365 (1882); Williams v. Fears, 179 U. S. 270 (1900).

"In People v. Reardon (184 N. Y. 436, 449, 77 N. E. 970. (1906)) the state had laid a transfer tax upon the transfer within the state of shares in a foreign corporation belonging to a non-resident. The power of the state to tax was questioned, on the ground that neither the person nor the property was taxable by the state; the court, however, held the tax valid as a privilege tax. Judge Vann said:

" 'The tax, however is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax which the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property. . . .

" 'Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. . . . Both they and their con-

tract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state.'

"Jurisdiction to exact a license fee, therefore, depends upon the place where the licensed act is done. Thus a license fee may be exacted from a foreigner for making a sale within the state: (Harrison v. Vicksburg, 3 Sm. & M. (Miss.) 581 (1844); People v. Reardon, 184 N. Y. 431, 77 N. E. 970 (1906), for operating a railroad within the state; (Maine v. Grand Trunk Ry. Co. 142 U. S. 217 (1891) or for using sleeping-cars within the state. (Pullman Southern Car Co. v. Gaines, 3 Tenn. Ch. 587 (1877). So an excise tax may be laid upon the payment of a dividend to a nonresident shareholder, (Oliver v. Washington Mills, 11 Allen (Mass.) 268 (1865)) or upon the receipt of insurance premiums from residents of the state; (Equitable Life Society v. Pennsylvania, 238 U. S. 143 (1915) and such a tax may be laid upon the performance within the state of a contract of sale made in another state. (Shriver v. Pittsburg, 66 Pa. 446 (1870)).

"Though the international jurisdiction of a state to levy an excise tax is complete, its exercise may often be limited by the Constitution of the United States. (See, for instance, Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885); Sault Ste. Marie v. International Transit Co., 234

U. S. 333 (1914). A consideration of such limitations is, however, beyond the scope of the present article."

II.

AN EXCISE TAX IN THE FORM OF A TAX UPON NET INCOME MUST NOT INCLUDE INCOME FROM SOURCES BEYOND THE POWER OF THE STATE TO TAX.

In the case of Miller v. City of Milwaukee, 272 U. S. 713, 71 Law Ed. 487, the State of Wisconsin passed an act imposing a net tax upon incomes The tax upon a corporation excluded interest from governmental securities, but a tax was imposed upon the stockholders equal thereto. Mr. Justice Brandeis, in his concurring opinion, at page 716-717, used the following language:

"The tax imposed upon the stockholder results, not from discrimination practiced by a state against the Federal government, but from the fact that the corporation happened to earn its dividend from securities on which, under the Wisconsin law, it was not required to pay a tax. Compare State ex rel. Columbia Constr. Co. v. Tax Commission, 106 Wis. 369, 165 N. W. 382. The operation and effect of the statute would be precisely the same if the dividend had been paid out of any other corporate income exempt from the state tax; from interest upon other tax exempt bonds, if any; or out of income from the part of a business carried on in another state (United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918 E,

748; State ex rel. Arpin v. Eberhardt, 158 Wis. 20, 147 N. W. 1016; Van Dyke v. Milwaukee, 159 Wis. 460, 466, 146, N. W. 812, 150 N. W. 509), or out of rentals or mine royalties received from land without the state, or out of profits received from the sale of property having a situs out of the state (Wisconsin Statutes, Sec. 71.02 (3) (See State ex rel. Mariner v. Hampel, 172 Wis. 67, 178 N. W. 244); or out of dividends received from banks (Wisconsin Statutes, Sec. 71.05 (1) (e))."

The foregoing distinction is observed in all of those cases maintaining the right of a state to impose a franchise tax upon a corporation measured by its net income from all sources including non-taxable investments. The Pacific Company Limited v. Charles G. Johnson, State Treasurer, United States Daily, April 12; McCallum v. Massachusetts, 279 U. S. 620, 73 L. Ed. 874; Flint v. Stone Tracy Co. 220 U. S. 107, 55 Law Ed. 387; Educational Films Corporation v. Ward, 282 U. S. 379, 75 Law Ed. 400.

III.

CONSTRUCTION OF A STATE COURT AS TO THE STATE TAX IS WELL-NIGH CONCLUSIVE.

In the case of Brown-Forman & Company v. Kentucky, 217 U. S. 563; 54 Law Ed. 883, this court affirmed the holding of the Supreme Court of Kentucky that a tax upon a person engaged in compounding, rectifying, adulterating or blending spirits as an excise tax. The court held that

the decision of the Supreme Court of Kentucky, that the tax was not a property tax should be definitely accepted, using the following language:

> "Such a construction and interpretation of the statute here involved by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax but a license tax imposed upon the doing of a particular business, plainly subject to the regulating power of the State."

Respectfully submitted,

WILLIAM H. WATKINS,
R. W. HEIDELBERG,

Attorneys for Appellant.

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CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 580

S. B. LAWRENCE, ET AL., Appellants,

VS.

STATE TAX COMMISSION,
STATE OF MISSISSIPPI, Appellees.

BRIEF FOR APPELLEES.

GREEK L. RICE, Attorney General, and
J. A. LAUDERDALE, Assistant Att'y. General,
Attorneys for Appellees

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VS.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The State Tax Commission of the State of Mississippi assessed S. B. Lawrence, a resident citizen of the State of Mississippi, with certain income taxes for the taxable year 1929, under the provisions of Chapter 132, Laws of 1924, as amended by Chapter 32, Extraordinary Session of 1928. Feeling aggrieved at this assessment, Lawrence appealed to the Chancery Court of the First Judicial District of Hinds County, as provided by law. The cause was tried in said Court on the original petition filed by the tax payer

and demurrer thereto. The Court overruled the demurrer; whereupon, the tax payer, Lawrence, refused to plead further, and a decree was entered against Lawrence and in favor of the State in the amount of the taxes as assessed by the State Tax Commission.

Whereupon, Lawrence prosecuted an appeal to the Supreme Court of Mississippi. The decree of the Chancery Court was affirmed, and Lawrence then prosecuted an appeal to this Court.

STATEMENT OF FACT.

The facts as reflected by the original petition in this case, and as aptly stated by Judge Ethridge in rendering the opinion of the Supreme Court of Mississippi, are as follows:

"S. B. Lawrence, the appellant, is a resident of Hinds County, Mississippi, engaged in constructing and maintaining public roads and highways in the State of Mississippi and in other states. In the year 1929 he went into the State of Tennessee, entered into and completed contracts for the construction of certain highways, which contracts were entered into and entirely completed in the state of Tennessee. He collected from that state the money accruing to him by reason of the performance of said contracts. His net income was such that, if his income earned and collected entirely beyond the limits of the State of Mississippi, in the State of Tennessee, were subject to taxation he would be owing the State of Mississippi the sum of $2,288.31." See record pages 1 to 10, inclusive, and page 20.

STATUTES IN CONTROVERSY.

Chapter 132, Laws of 1924, levied a general income tax and provided for the collection thereof. Section 11 of said Chapter defined the words "gross income." Said Section 11 was amended by Chapter 32, Laws of Extraordinary Session of 1928.

That part of said statutes necessary for the determination of the questions involved in this lawsuit, is as follows:

"Sec. 11. That for the purpose of this act, except as otherwise provided for non-residents, the term gross income—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal growing out of the ownership or the use of any interest in such property, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit or gains or profits, and incomes derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which, received by the taxpayer; provided property sold upon what is known as the installment plan when the initial payment is twenty five per centum or less, the income may be included for taxation in that portion of any installment payment representing gain or profit in the year in which payment is received.

"(b) The term gross income, does not in-

clude the folowing items which shall be exempt from taxation under this act:

"(1) * * * *
"(2) * * * *
"(3) * * * *
"(4) * * * *
"(5) * * * *
"(6) * * * *
"(7) * * * *

"(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay a tax pursuant to this act, or dividends from a national bank or state bank organized under the laws of the state of Mississippi."

"(9) * * * *
"(10) * * * *

Chapter 32, Laws Extraordinary Session of 1928 amended said Section 11 by adding after sub-section 10, sub-section 11, which is as follows:

"(11) Income of a domestic corporation, when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising." See Appendix I Appellants Brief.

QUESTIONS INVOLVED.

The questions involved in this case are as follows:

1. *Whether under the Constitution of the United States and the Constitution of Mississippi the State of Mississippi may levy and collect an income tax on an in-*

come earned beyond the borders of said state, by a resident citizen of the State.

2. *Whether Section 11, Chapter 132, Laws of 1924, as amended by Chapter 32, Laws Extraordinary Session of 1928, contravenes any provision of the Constitution of the United States or of the State of Mississippi.*

BRIEF AND ARGUMENT.

The argument for appellees will be presented under the same *points* and *sub-headings* as are used by counsel for appellant in his original brief.

B, C AND D.

There is no controversy in reference to the matters and things stated and the law cited in the brief for appellant under the sub-headings designated in the brief for appellant as B, C, and D, except that on page 4 of said brief appellant states as follows: "That for the purpose of entering into said contracts and performing the same, he adopted a situs in the State of Tennessee." It is shown by the record that appellant was a resident citizen of the State of Mississippi. Record 1, 3, 11, 12 and 20. On page 8 of the record, as a part of the petition filed in the Chancery Court, the following statement appears: "That under Chapter 32, as aforesaid, this petitioner became and was adjudicated to be liable for taxes on income thus earned and collected out of *the State of Mississippi where he maintains a business situs.*" It appears then from the record that appellant maintained his "business situs" within the

State of Mississippi, and that he was a resident citizen of the State of Mississippi.

E.

POINT I.

"The statute of the State of Mississippi complained of violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellants of their property without due process of law and denied to them the equal protection of the law, in that the Statute, as construed and enforced in this case, imposed liability upon the appellant for an excise, occupation or privilege tax on income contracted for and earned in following an occupation wholly and exclusively beyond the limits of the State of Mississippi, in the State of Tennessee. Consistent with the Fourteenth Amendment to the Constitution of the United States, a State may not tax persons, property or an occupation, or the income earned therefrom, beyond the limits of the state."

"(a) *The tax imposed upon Lawrence, the appellant, is an excise and not a property tax."*

Appellees concede that the tax imposed on Lawrence, the appellant, is an excise and not a property tax.

In my opinion, this proposition determines the other questions involved in this case, for the distinguishing feature in the cases relied upon by counsel for appellant and counsel for appellee is: In those cases relied upon by appellant the Courts hold that the tax therein referred to is a

property tax, and, therefore, a state is without authority to levy and collect a tax on property with a legal situs in another state; in those cases relied upon by appellees the Courts hold that where the tax is not a property tax but is an excise tax, an income tax may be levied even though the income is earned by the taxpayer beyond the confines of the State.

> "(b) *The State of Mississippi is without authority to levy an excise tax on income earned beyond the borders of the State.*"

In the case of *Hattiesburg Grocery Company v. Robertson*, 126 Miss., 34, 88 So., 4, involving the constitutionality of Chapter 101, Laws of 1912, the court held that the income tax imposed by the State of Mississippi possesses some of the elements both, of a tax on property and of a tax on persons, but that it cannot be strictly classified as a tax on either, because it is generally and necessarily an excise tax, and that in its last analysis, it is simply a portion of the taxpayer's net income appropriated by the state in consideration of the rights and protection granted by it to the taxpayer, Smith, C. J., speaking for the court, said:

> "Income is necessarily the product of the joint efforts of the State and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive and enjoy, and a tax, therefore, in the last analysis is simply a portion cut from the income and appropriated by the state as its share thereof, and while the tax on income includes some of the elements both of a tax on property and of a tax on persons, it cannot be classified as strictly a tax on either,

for it is generically and necessarily an excise, and should be enforced as such."

In the case of *State v. G. M. & N. R. R. Company*, 138 Miss., 70, 104 So., 689 where the same questions were raised with reference to Chapter 132, Laws of 1924, the court adhering to the doctrine announced in the Hattiesburg Case re-iterated that the Mississippi income tax is an excise and not a property tax. Smith, C. J., again speaking for the court said:

> "This contention is ruled by *Hattiesburg Grocery Company v. Robertson*, 126 Miss., 34, 88 So., 4, 25 A. L. R. 748, wherein this court after mature consideration held that a tax on income is an excise and is not a tax on the property from which the income may have been derived. As was there pointed out, a tax on income from property includes some of the elements both of a tax on property and a tax on persons and cannot be classified as strictly a tax on either alone. Property of itself alone cannot produce income but must be used or dealt with in some way by a person before gain or income can be derived therefrom, and no definition of income, though derived from property, can be framed which does not include the activities of the person by whom it was produced, received, or enjoyed."

With reference to the contention made by the appellee in the above styled case that the law conflicted with the commerce clause of the Federal Constitution, the court said:

> "The income of the G. M. & N. R. R. Company is derived from both inter and intrastate com-

merce and its contention is that a tax by the state on that portion of its income derived from interstate commerce is a burden on such commerce within the meaning of this clause of the Federal Constitution. If the tax were on gross income, a serious question would be here presented, but it is not on gross but on net income, and a tax on net income derived in whole or in part from interstate commerce is not a burden thereon within the meaning of this clause of the Federal Constitution as pointed out by the Supreme Court of the United States in *Glue Company v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 46, 65 L. Ed. 169; *Shaffer v. Carter*, 252 U. S. 36, 40 Sup. Ct. 221, 64 L. Ed. 445; *Atlantic Coast Line Railroad Company v. Daughton*, 262 U. S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051."

The brief for the appellee in the above styled cause shows that the very principle here contended for by the appellant was brought to the attention of the court on page 82 of the Mississippi Reports in the brief for the appellee where the following appears:

"An excise tax cannot be given extra-territorial effect. 26 R. C. L. 295. If this be an excise tax then it cannot be imposed upon the performance of an act, or the enjoyment of a privilege exercised in Alabama or Tenessee. That a state cannot impose an excise tax upon an act or privilege done or had beyond its own boundries is so apparent as to need no citation of authority. When the state treats this tax as an excise for one purpose, it must do so for all purposes. To say that it

is an excise tax when attacked on the ground of its violation of Section 112, but to all other intents and purposes is to be treated and dealt with as a property tax is to admit that it partakes more of the nature of a property than of an excise tax."

In overruling the foregoing contention, the court said:

> "As to the extra-territorial effect of the act: the tax imposed on residents of the state and on domestic corporation is on the whole of their income derived from business within or without the state, and the contention is that the tax is void in so far as it covers income derived from business without the state. The question here presented was ruled against the appellees by the Supreme Court of the United States in *McGuire v. Trefry*, 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739, and *Shaffer vs. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445."

Before proceeding to an examination of the cases cited by the appellant in his brief, we call attention to the fact that in the present case the question of the state's power to tax property situated in another state is not involved. Of course, we admit that the State of Mississippi has no right to levy a tax on real estate situated within another state, nor is the question of taxation by the state of intangible personal property located in another state involved here under the legal fiction of *mobilia sequuntur personam*. So far as the present record is concerned, Mr. Lawrence had no property, either in the State of Mississippi, or in the State of Tennessee. It is true that the fulfillment of the contract required the use of certain teams, road machinery and other equipment, but for all this record shows this

might have been rented by Mr. Lawrence or might have been the property of a sub-contractor. The case, therefore, does not concern the taxation of real property, tangible or intangible personal property, but is confined to the sole question whether the income tax levied on a resident indidual may be measured by the entire net income derived from sources without the state.

All the cases cited by appellant involve in some form or other the taxation of persons or property outside of the jurisdiction of the state, or intangible personal property actually situated in another state, but theoretically having a legal status in the state of the owner's domicile.

In the case of *Frick v. Commonwealth*, 268 U. S. 473, 69 L. Ed. 1058, the state of Pennsylvania attempted to levy an excise tax on certain property in foreign jurisdictions which was owned by the decedent at the time of his death. The court held that in effect this was an attempt on the part of the State of Pennsylvania to levy a tax on real property situated in another state and was, therefore, violative of the Fourteenth Amendment of the Federal Constitution.

In the case of *Farmers Loan and Trust Company v. State of Minnesota*, 280 U. S. 204, 74 L. Ed. 371, a resident of the State of New York owned certain certificates issued by the State of Minnesota. The owner died in New York, and the State of Minnesota levied an excise tax. Here too, the Supreme Court held that the State of Minnesota was without power to tax the property because it was situated in a foreign jurisdiction.

We submit that neither of the foregoing cases decided the question here involved, for the reason that the State of Mississippi is not attempting to tax the property of Mr. Lawrence in any manner whatsoever. Our income tax law levies an excise tax and not a property tax. Furthermore, this case does not present one where the State of Mississippi is attempting to levy an excise tax, the amount of which is measured by real or personal property located in another state.

In the case of *Safe Deposit and Trust Company v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, the taxing authorities of Virginia, levied a property tax upon a certain trust fund in the possession of the *Safe Deposit and Trust Company of Baltimore, Maryland.* The sole question decided by the court was whether the State of Virginia had the authority to levy a property tax upon the assets of the trust fund. The Supreme Court held that such authority did not exist. The opinion of the court shows that the tax was levied upon the whole corpus of the trust estate.

The case of *Fidelity Trust Company v. Louisville*, 245 U. S. 54, 62 L. Ed. 145 seems to support the contention of the appellee. In that case the City of Louisville, Kentucky sought to recover annual taxes for certain years on personal property omitted from the original assessment. The facts in the case were that L. P. Ewald was domiciled in Louisville but continued to carry on business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks subject to Ewald's order alone. They were

not used in the business and belonged absolutely to him. The court stated that the question presented was whether the funds could be taken into account in determining the amount of his Louisville tax. Mr. Justice Holmes delivering the opinion for the court said:

> "The present tax is a tax upon the person as is shown by the form of the suit and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared to be unlawful by authority, we see nothing to hinder the state from taking a man's credit into account. But so far from being declared unlawful, it has been decided by this court that whether a state shall measure the contribution by the value of such credits and chooses in action not exempt by superior authority is the state's affair not to be interfered with by the United States, and, therefore, that a state may tax a man for a debt due from a resident of another state."

It will be noted that inasmuch as the Supreme Court declared the Kentucky statute to impose a tax upon the person and not a tax upon the property, the situs of the property was immaterial.

The case of *McGuire v. Trefry*, 253 U. S. 12, 64 L. Ed. 738, cited by the Supreme Court of Mississippi in the case of *State v. G. M. & N. R. R. Company*, supra, involved the validity of the tax imposed by the State of Massachusetts on a trust fund held in the State of Pensylvania. The court

therein, speaking through Mr. Justice Day, said:

> "The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. The case presents no difference in principle from the taxation of credits evidenced by the obligations of the person who are outside of the state, which are held taxable at the domicile of the owner."

It is true that the State of Massachusetts has construed the income tax law of that state to be a property tax rather than an excise tax, but we submit that this fact would not affect the constitutionality of the tax. The Supreme Court of the United States has repeatedly announced the doctrine that it will consider the effect of a tax, rather than the mere name by which it is called. In the case of *Shaw v. Carter*, 252 U. S. 37; 40 Sup. Ct. 221; 64 L. Ed. 445, it was insisted that the income tax imposed was a personal tax as to resident citizens, and that it was a property tax with reference to non-residents. Mr. Justice Pitney in answering the contentions said:

> "This argument upon analysis resolves itself into a mere question of definitions and has no legitimate bearing upon any question, raised under the Federal Constitution, for where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, con-

struction, or definition, but upon the practical operation and effect of the tax imposed."

In the case of *Underwood Typewriter Company v. Chamberlain*, 254, U. S. 113, 65 L. Ed. 165, the question was raised whether the tax imposed was an excise tax to be measured by income, or direct tax upon that income. Mr. Justice Brandies quoted with approval the ruling in the Shaffer Case and held that the argument resolved itself into a mere question of definition and had no legitimate bearing upon any question raised under the Federal Constitution.

We, therefore, submit that the authorities show that the doctrine of *mobilia secuuntur personam* is immaterial in so far as the constitutionality of the tax is concerned. A tax which in effect is upon property outside of the jurisdiction of the state cannot be validated by resorting to this legal fiction. On the other hand, a tax which is levied upon a person residing in a certain jurisdiction will not be invalidated under the decision in the Shaffer Case and in the Fidelity Trust Company Case on the ground that the property is located in a foreign jurisdiction.

In the case of *Anderson v. Savage*, 139 N. E. 496; 245 Mass. 174, complainant was an inhabitant of the State of New York from January 1st, 1920 to May 16th, 1920 where he was employed by a Delaware Corporation which had its principal place of business in New York City. Complianant received a yearly salary of $5,000.00 payable monthly. The corporation moved its office to Boston on May 17th, 1920, complainant also moving to Boston and continuing his employment with the company. In making his return

he included his entire salary for the year, about five or six months of which had been earned while he was a citizen of New York. He thereafter made application for abatement, which was denied. Complainant relied upon the case of *Hart v. Tax Commission*, 240 Mass., 37; 132 N. E. 721, holding that the Massachusetts income tax is laid directly on the income of property and is in reality a tax on the property itself, and that, therefore, as a part of the income was received outside the jurisdiction of Massachusetts, it was not subject to taxation in Massachusetts. The Supreme Court of Massachusetts, however, stated that the Hart Case had to do with a tax laid upon income derived from property where the person to whom the income tax was assessed was not an inhabitant or domiciled in the commonwealth and where the person or property, or income from the property, was not within the jurisdiction of the commonwealth and where during the time with respect to which the tax was laid the court stated:

> "In the case at bar the complainant was an inhabitant and domiciled in the commonwealth from June 1st, until December 31st. of the year with respect to which the tax was assessed upon him and during his inhabitancy he received the income from his salary and the dividends and interest from his investments which were apportioned to that period of time. These provisions and those as to deductions are clearly intended to recover a return and an assessment of an entire income received during the entire year, the calendar year, prior to the assessment of the tax. There is nothing in the statute which gives countenance to, or is authority for the levy of an assessment on income which shall not be the entire income re-

ceived by an inhabitant in case such inhabitant becomes an inhabitant of the commonwealth during the year prior to the assessment."

In the case of *Kennedy v. Commissioner of Corporations*, 152 N. E. 747, the Supreme Court of Massachusetts limited the doctrine announced in the Anderson Case. In the Kennedy Case petitioner removed from Pennsylvania to Massachusetts on October 8, 1921, and in 1922 filed her return showing that part of her income was received while a resident of Pennsylvania and also her income received in Massachusetts, a tax was levied upon the entire income. Without passing on the constitutionality of the question involved, the court construed the statute to exclude income received from sources outside the state on the ground that where possible, the courts should construe a statute so as to prevent grave doubts of its unconstitutionality.

In the case of *People, ex rel Estate of Woolworth v. S. T. Commissioners*, 192 N. Y. S. 772; 200 App. Div. 287, involving the question of taxation of income received from foreign jurisdictions, the facts were: Frank W. Woolworth was a resident citizen of New York on January 1, 1919 and remained a resident until the time of his death on April 8, 1919. The income tax law of New York took effect January 1, 1919. The record did not show when Woolworth became a citizen of New York, but the court said that apparently it was of no importance. The act defined the word "resident" as applying only to natural persons and including for purposes of determining liability any person who should die at any time during the last six months of the calendar year. As before stated, Woolworth did not die during the last six

months of the year but on April 8th. The court defined the issue as follows:

> "The sole question raised is whether the relator is taxable as a resident or a non-risident. The effect of adopting relator's contention (that he was a non-resident) would be to exclude from the computation of his tax the amount of his income from sources without the state aggregating an additional tax plus interest of $9,064.67. The elimination of such income would produce a tax of $28.41."

In deciding the question the court said:

> "It is our interpretation that Mr. Woolworth was up to the time of his death a resident and subject to the complete jurisdiction of this state; that his entire income from all sources was subject to the taxing power of the state."

It is true that the constitutionality of the tax was not argued in the foregoing case, but the issues were so framed that the question would naturally have presented itself to the able attorneys appearing therein.

26 R. C. L. p. 144, Section 118 (Permanent Supplement Addition) discusses the question as follows:

> "As the income tax comes into more common use, interesting questions are liable to arise respecting the situs of income for the purpose of taxation. But at the present time the law upon this subject is not fully developed. As between different nations, it appears to be held that one nation

can tax the income of its own citizens from whatever territorial source derived; that it can even tax the income of one of its own citizens resident in a foreign country and deriving his income from property situated or business carried on in such country, while at the same time it can tax an alien resident or non-resident on income derived from property situated or business carried on within its terirtorial limits. * * * The same principles are applied in this country to corporations, a corporation being a citizen of the nation by the laws of which it was incorporated and domestic corporations being taxed on their entire net income, while foreign corporations doing business in this country are taxed on so much of their income as is derived from the local business carried on. * * * *

With regard to an income tax on domestic corporations, there would seem to be no constitutional difficulties in taxation by a state of the entire net income of a domestic corporation for its business operations wherever they may be carried on."

In the case of *Shaffer v. Carter*, 252 U. S. 37; 64 L. Ed. 445, the court has this to say regarding the taxation of its resident citizens:

"As to residents it may and does exert its taxing power over their income from all sources whether within or without the state, and it accords to them a corresponding privilege of deducting their losses wherever these accrue. As to non-residents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from

those sources. Hence, there is no obligation to accord to them a deduction by reason of losses elsewhere incurred."

The case of *Crescent Manufacturing Company v. Tax Commission*, S. C. 124 S. E. 761, decided by the South Carolina Court supports the appellee's contention. The manufacturing company in the above case contended that the laws of South Carolina did exempt domestic corporations from income tax calculated on net income derived from business operations outside of the state. The court held, however, that the income tax law of that state levied a tax upon the entire net income of a domestic corporation from whatever source derived. The court stated as follows:

"If this act is a state income tax law, as it purports to be, and if by virtue of Section 13 the tax is limited to net income derived from sources within the state, then the inevitable effect of the law in practical operation is to impose upon a certain class of the state's income earners or recipients more than their just and equitable share of the general burden of taxation. To illustrate, here are two residents and citizens of the City of Chester, South Carolina. Each has a net income of $15,000.00. One derives his income from farms and mercantile operations in the State of South Carolina, and the other derives his income from investments and land and from an interest in an insurance business conducted in the State of North Carolina. Both get the benefit of all that the government of the state through expenditures from the public treasury for schools, roads, police protection, and the social, and economic welfare of the people can furnish. Under the construction

of this act approved in the circuit decree the citizen who derives his income from his farms and mercantile business within the state in addition to paying into the treasury of the state a direct tax on his property real and personal, a municipal license tax on his mercantile business, and a tax on his income to the Federal Government, must pay to the state as a tax on his net income one-third of the amount paid as income tax to the United States, but the other citizen of Chester whose income is derived from sources outside the state and who gets practically as much out of the state in the benefits of Government as the other man would have to pay for the support of that government not one cent exclusive of his poll tax and perhaps a nominal street or road tax, etc. Between these two income earners or gatherers an intent on the part of the legislature to discriminate against and tax the citizen of the state who receives his income from sources and operations within the state and exempt the other is not to be readily implied. Why resort to an income tax at all, if the burden thereof is to be borne exclusively by the class of the state's citizen who already pay the property and business taxes of the state? That the construction of the act approved in the circuit decree which confines the application of the tax to income derived from operations and sources within the state would work a serious and unjust discrimination against that class of the state's citizens and tax payers whose income is derived from local sources in favor of that large class of the state's citizens, natural and corporate, whose income in whole or in part is derived from operations and sources outside of the state would seem to be sufficiently apparent."

The case of *Hans Rees Sons, Incorporated, v. State of North Carolina*, 283, U. S. 123 75 L. Ed. 879, does not decide that a state may not lawfully tax a resident or a domestic corporation on its entire net income regardless of the territorial source from which it may be derived. The facts in that case show that the State of North Carolina was undertaking to tax the income of a foreign corporation and to measure the tax by the entire net income of the corporation derived from business conducted throughout several states.

The authorities cited by the appellant do not support his contention that the tax is unconstitutional. In *Safe Deposit and Trust Company v. Virginia*, 280 U. S. 83; 74 L. Ed. 180, the tax was declared void because the authorities had no jurisdiction to levy a tax on the corpus of an estate over which it had no control; in *Farmers Loan and Trust Company, v. State of Minnesota*, the tax was declared void because the state had no jurisdiction either of the person or of the property which it was seeking to tax; in *Frick v. Commonwealth* the State of Pennsylvania imposed an inheritance tax measured by the actual value of lands situated in another state which was the same as imposing a direct tax on the land; the case of *Rees Sons, Incorporated*, as above stated, is not in point because the state was taxing the net profits of a foreign corporation, the greater part of which was derived from sources outside the state.

The case of *Fidelity Trust Company v. Louisville*, 245 U. S. 54, 62 L. Ed. 145 permitting the imposition of a personal tax by the State of Kentucky measured by money received from a business conducted in another state and kept on deposit there directly supports appellee's contention, and

that this contention is further upheld in *McGuire v. Trefry*, 253 U. S. 12; 40 Sup. Ct. 417; 64 L. Ed. 739; *Shaffer v. Carter*, 252 U. S. 37; 40 Sup. Ct. 221; 64 L. Ed. 445; *Woolworth Estate v. Tax Commission*, 192 N. Y. S. 772; 200 App. Div 287, and *Crescent Manufacturing Company v. Tax Commission*, 129 S. C. 480; 124 S. E. 761.

Appellee further maintains that the doctrine of *mobilia sequuntur personam* is not decisive of the constitutional question here involved because the Supreme Court of the United States has repeatedly declared that the constitutionality of a tax must be determined by its effect rather than by some arbitarary definition or legal fiction. Thus in the McGuire case if the effect of the tax was to tax property in Pennsylvania, then the court would not have permitted a violation of the Fourteenth Amendment under the guise of a property tax on a theoretical situs of property. Again in the Louisville Case, the court permitted the imposition of a personal tax measured by certain bank accounts situated in another state, thereby eliminating the doctrine of *mobilia sequuntur personam*.

In the present case appellant admits by implication that if the Mississippi income tax was a property tax and if the $50,000.00 earned by Mr. Lawrence was on deposit in a Tennessee bank or was invested in a bond kept in a safe deposit vault there, it would be taxable in Mississippi, yet he argues that the same $50,000.00, if taxed by an excise tax, would violate the Fourteenth Amendment. In either case the income would be earned in Tennessee, and the tax, omitting all technical definitions and legal fictions, would be a tax imposed by Mississippi on the income received by

Mr. Lawrence in Tennessee. As stated above in the Louisville case, the Kentucky tax was construed to be a personal tax measured by a bank account in another state. The situs of the property therefore, was not involved. It is true that in the McGuire and the Safe Deposit Bank cases the doctrine of *mobilia sequuntur personam* was applied because the courts had construed the taxes to be property taxes, but it does not follow that an excise tax levied under like circumstances would be unconstitutional. It seems that the difficulty in those cases lay in the very fact that since the tax had been declared a property tax it was necessary to bring the property within the jurisdiction of the state.

Chapter 132, Laws of 1924 and amendments thereto imposes an income tax, which our court has held to be in the nature of an excise tax but partaking in many respects of the attributes of a real and personal tax. In discussing the contention made in the Hattiesburg Grocery Company case and the G. M. & N. R. R. Company case that a tax levied on income derived from property was a tax on the property itself the court remarked that there could be no income derived from property without some activity on the part of the owner, and that the Laws of 1924 placed a tax upon the net income accruing to the owner as a result of such activities. Using this reasoning as a predicate, appellant argues that before an income tax is collectible, the tax payer must have done some act resulting in a profit, and that the act must have been performed in this state; otherwise the Fourteenth Amendment is violated. This is placing too broad an interpretation on the language of the court, for it is entirely permissible for the state to tax the increment of property, the interest on bonds, dividends on

stocks, and even gifts, all of which result in gain to the taxpayer without any act on his part. If the court should adopt appellant's contention, it will be a very easy matter for men of wealth to escape taxation on income received from intangible personal property. For illustration, a resident citizen of Mississippi goes to New Orleans and purchases first mortgage six per cent bonds in the sum of $100,000.00, secured by real estate in Texas, which he places in a safe deposit box in the New Orleans bank. By his direction, the interest payments are placed to his account in the same bank. The Mississippi citizen has performed one single act in this state and that was to leave it. His rights are determined by the laws of other jurisdictions. Texas must determine his right in and to the lands securing his bond and enforce the provisions of the mortgage. His contract of purchase is determined by Louisiana, the state in which the contract was made and executed, and his possessory rights are determined by the same laws. The Mississippi citizen receives $6,000.00 a year from his investment and yet under appellant's theory he could not be assessed with an income tax in this state. It will not do to say that for some purposes the doctrine of *mobilia sequuntur personam* would apply because our law imposes an excise tax and jurisdiction of the *res* is immaterial. We cannot believe that the court will adopt a theory leading to such unjust results and practically inviting an invasion of our tax laws.

If further citation of authority is necessary to substantiate the appellee's contention that the State of Mississippi has authority to impose an income tax on a resident individual measured by his net profit from all sources, we

call attention to the case of *Royster Guano Company v. Virginia*, 253 U. S. 412; 64 L. Ed. 989. In that case the State of Virginia undertook to tax domestic corporations on net income received from sources both within and without the state and to exempt certain other domestic corporations from taxation where no business was conducted within the state, except the holding of certain meetings. The court held that this was an unlawful discrimination. The case seems to be authority for the following propositions: (1) A state may impose an income tax on the net profits of a domestic corporation derived from sources within and without the state. (2) A state may impose a tax on the net income of a domestic corporation earned wholly without the state.

These conclusions necessarily follow because if the State of Virginia was without authority to impose an income tax on income earned wholly or partly in another state, the question of exemption was immaterial. If a state is without power to impose a tax on the income of a domestic corporation derived outside of the state, the above case places the Supreme Court of the United States in the position of saying that an exemption was discriminatory and unjust when the state in the first instance did not have the power to levy the tax which it sought to exempt. The plea of discrimination necessarily implies an admission of the validity of the tax on which the exemption is based.

(c) *"Since the occupation carried on wholly beyond the limits of the State may not be taxed at the source, the income arising therefrom is not, consistent with the Four-*

teenth Amendment to the Constitution of the United States, subject to taxation."

To sustain this contention, plaintiff relies on the *National Life Insurance Company vs. United States*, 277 U. S. 508; 72 L. Ed. 968, and *Miller vs. Milwaukee*, 272 U. S. 713; 71 L. Ed. 487. The doctrine of these cases is that to directly tax the income from securities amounts to taxation of the securities themselves; that State and Federal bonds are exempt from taxation and the interest thereon is exempt from taxation.

He further relies on the cases of *Gillespie vs. Oklahoma*, 256 U. S. 501, 66 L. Ed. 338, and *Indian Territory Illuminating Oil Co. vs. Oklahoma*, 242 U. S. 522, 60 L. Ed. 779. These cases involved the right to tax the income from oil and gas leases of Indian lands. The Court held that these were instrumentalities of the United States Government and not subject to taxation.

The question involved in this case is whether or not the income of a resident citizen of the State may be taxed by this State even though it is earned outside the limits of the State, and I submit that the following cases sustain the contention that such income may be taxed.

Kirkland vs. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558. The Court held as follows:

> "Plainly, therefore, our only duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident

of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall. 320 (82 U. S., XXI 187). It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the Government whose protection he enjoys.

"The debt in question although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor."

In the case of *U. S. Glue Co. vs. Oak Creek*, 247 U. S. 321; 62 L. Ed. 1135, the Court stated the case as follows:

"Plaintiff was and is a corporation organized under the laws of the state of Wisconsin, having its principal office and place of business in the town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the state, and in other states and foreign countries. Its net 'business income' in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about $124,000, derived from the following sources: (a)

About $16,000 from goods sold to customers within the state and delivered from its factory; (b) about $65,000 from goods sold to customers outside of the state and delivered from its factory; (c) about $31,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches in other states, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about $7,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches without the state, these goods having been purchased by plaintiff outside of the state and shipped to plaintiff's factory in the state, and thence shipped before sale from the factory to the branches; (e) about $5,000 from goods sold outside of the state, the sales having been made and goods shipped from the points of purchase to the branches without coming into the the state of Wisconsin.

"No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the state was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the supreme court, that items (b) and (c) were not taxable because derived from interstate commerce."

The statute here in controversy provided "that any person engaged in business within and without the State shall * * * * be taxed only on that portion of such income as is derived from business transacted and property located within the State."

The Court held as follows:

"And so we hold that the Wisconsin Income Tax Law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business."

In *MaGuire vs. Trefry*, 253 U. S. 12; 64 L. Ed. 739, this Court held as follows:

"In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the state to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another state.

"In *Fidelity & C. Trust Co. v. Louisville*, 245 U. S. 54; 62 L. Ed. 145; L. R. A. 1918C 124; 38 Sup. Ct. Rep. 40, we held that a bank deposit of a resident of Kentucky in the bank of another state, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co. v. Kentucky*, supra, was distinguished, and the principle was affirmed that the state of the owner's domicil

might tax the credits of a resident, although evidenced by debts due from residents of another state. This is the general rule recognized in the maxim 'mobilia sequuntur personam,' and justifying except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicil of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application, and may yield to the exigencies of particular situations. But we think it is applicable here.

"It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property, in view of the law, but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others.' 2 Story, Eq. 11th ed. Sec. 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

"The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state, which are held taxable at the domicil of the own-

er. *Kirtland vs. Hotchkiss,* 100 U. S. 491, 25 L. Ed. 558."

Safe Deposit & Trust Company of Baltimore vs. Commonweath of Virginia, 280 U. S. 83, 74 L. Ed. 180. In this case the Court was careful to distinguish the facts of this case from the facts in other cases mentioned in the opinion. The Court stated that the question involved in this case was as follows:

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State. We think Not."

The Court distinguished the facts in this case from the facts in other cases as follows:

> "No opinion of this court seems definitely to rule the exact point now presented. *Blackstone v. Miller,* 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277, sustained an assessment of tax by New York under the transfer of credits declared to have taxable situs within her borders, under the will of a citizen of Illinois. In *Wheeler v. Sohmer,* 233 U. S. 434, 57 L. ed. 1030, 34 Sup. Ct. Rep. 607, the tax was not laid at the owner's domicile, but by the state wherein the securities were deposited. *Bullen v. Wisconsin,* 240 U. S. 625, 60 L. Ed. 830, 36 Sup. Ct. Rep. 473, involved an inheritance tax; the creator of the trust resided in Wisconsin at his death and an Illinois company with legal title then held possession of the property in Chi-

cago; but the creator had retained full power to revoke the trust and regain control. *Fidelity & C. Trust Co. v. Louisville*, 245 U. S. 54, 62 L. ed. 145, L. R. A. 1918C, 124, 38 Sup. Ct. Rep. 40, sustained a tax laid at the domicile of the legal owner. He had full power to control the deposits in St. Louis banks and might have brought the entire fund within Kentucky's jurisdiction. In *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. Rep. 410, the decedent—a resident of Connecticut—had control and present right to all benefits arising from the property. The legal title was not held by another with the duty to retain possession, as in the present cause. Moreover, this court did not there determine that the property had a taxable situs in New York."

I, therefore, most respectfully submit that these cases fully sustain the holding of the Supreme Court of the State of Mississippi in the case of *Knox vs. G. M. & N. R. R. Co.*, 138 Miss. 70, and they also fully sustain the contention that the income of Mr. Lawrence, a resident of Mississippi, earned in Tennessee, was subject to the income tax levied by said Chapter 132, Laws of 1924 and amendments thereto.

(d) *"The income earned and the property with which same was earned subject to taxation in Tennessee."*

Under this heading, counsel for appellant cites the 1927 Acts of Tennessee Legislature, imposing a privilege tax upon contractors. There is no showing in the record that the appellant was liable for this tax or that he paid this tax, or that he had any property whatever in the State of Tennessee, or that he paid any taxes in said State.

The appellant was under the protection of the Laws of the State of Mississippi, his estate was under the protection of the laws of Mississippi, and the income earned by him in the State of Tennessee was under the protection of the laws of the State of Mississippi.

This Court held in the case of *Maguire vs. Trefry*, 253 U. S. 12, 64 L. Ed. 738, as follows:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and freedom, and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. *It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference.*"

POINT II

"No liability is imposed on domestic corporations engaging in competition with appellant, for construction of highways in Mississippi and adjoining states, including Tennessee, under similar circumstances."

(a) The state may levy an excise on income earned beyond the confines of the state by resident citizens of the state and not levy such a tax against the income of domestic corporations.

Section 11, chapter 132, Laws of 1924 as amended by chapter 32, Extra Session 1928, provides as follows:

"(b) The term, gross income does not include the following items which shall be exempt from taxation under this act."

"(8) Income received during the taxable year as dividends from a corporation on which such corporation has already paid, or is liable by assessment to pay, a tax pursuant to this act."

"(11) Income of a domestic corporation when earned from sources without this state, and such sources shall be defined to mean places of manufacture or production and places of merchandising."

Under this provision a domestic corporation is not required to pay the income tax on income earned beyond the borders of the state, however, the resident stockholders of such domestic corporations are required to pay income tax on the dividends received from such corporations.

A domestic corporation which earns its income within the state, pays the income tax thereon. The stockholder in such corporation does not pay a tax on the dividends received from the corporation.

In the instant case, Lawrence, an individual, had contracts in Alabama, Mississippi and Tennessee. The Missis-

sippi statute required him to pay an income tax on the net income received from all of such contracts, whether the income was earned in Mississippi or out of Mississippi. He was likewise permitted to deduct from his income losses sustained by his operations in either of such states; that is, if he had a loss in Mississippi, and a profit outside of Mississippi, his losses would be deducted from his profits.

A domestic corporation is required to pay the taxes on the income earned in Mississippi. It is not required to pay a tax on income earned outside of the state, and it is not permitted to deduct losses on operations outside of the state.

In the case of *Franklin v. Carter*, Tenth Circuit, 51 Fed. (2nd) 345, the court stated the facts as follows:

> "The petition alleged that appellant was a resident of Oklahoma engaged in the production and sale of oil and gas in competition with corporations doing a like business in that state; that sections 9934 to 9945, inclusive, C. O. S. 1921, purport to impose a tax upon his income and to exempt the income of corporations from such tax; that such exemption is discriminatory and deprives him of due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution. The trial court sustained a demurrer to the petition."

The court holds as follows:

> "(7) The question here is whether the

classification in the instant case rests upon a substantial difference and bears a reasonable relation to the object of the legislation. This precise question was considered in *Conner v. State*, 82 N. H. 126, 130 A. 357, and the court held the New Hampshire statute valid on the ground that avoidance of double taxation was a sufficient basis for such classification.

A general income tax law imposing a tax alike on corporations and natural persons will result in double taxation of the earnings of corporations paid as dividends, unless some method is devised to exempt either the corporation or its stockholders from the tax on such earnings. In framing the income tax law in question, the Oklahoma legislature undertook to avoid the injustice of taxing both the corporation and its shareholders on the earnings paid as dividends, by providing that the shareholders should pay taxes on such earnings when received by them in the form of dividends, and, exempting the corporation from tax.

A tax laid upon only the earnings of a corporation when paid to its stockholders as dividends results ultimately in a tax on a substantial portion of such earnings and avoids double taxation thereon.

It is our opinion that there is a substantial difference between corporations and natural persons for income tax purposes because, ordinarily a large portion of the earnings of a corporation are paid to its stockholders as dividends and are income of both the corporations and such stockholders; that it affords a rational basis for the classification provided by the statute here in question; that such classification rests on a difference

having a fair and substantial relation to the object of the legislation; and that it results in like treatment to all persons similarly situated.

It follows that the statute does not violate the equal protection clause of the federal constitution."

Petition for writ of certiorari was denied by the court.

See *Franklin v. Carter*, No. 394, 75 L. Ed. 55.

In the case of *Iowa, Des Moines National Bank v. E. R. Bennett*, Nos. 15 and 16, cited by counsel for appellant. This court was construing the Federal statute providing that a state might tax the stock holders in a National bank in a certain way. The case had no reference to a constitutional provision and is not authority for contention of appellant herein.

Counsel for appellant in support of the proposition raised under Point 11 of their brief, cite *Frost v. Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483, which case, I submit, has no application to the proposition here involved. That case decides:

"That by the statutes of Oklahoma cotton gins operated for the ginning of seed cotton for the public for profit are declared to be public utilities in a public business, and no one may engage in the business without first securing a permit from a public commission, which is empowered to regulate the business and its rates and charges, as in the case of Transportation and Transmission Companies, *Held*: That the right of one who has com-

plied with the statutes and secured his permit is not a mere license, but a franchise granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment.

While the franchise thus acquired does not preclude the state from making similar valid grants to others, it is exclusive against attempts to operate a competing gin without a permit, or under a void permit, in either of which event the owner may resort to a court of equity to restrain the illegal operation as an invasion of his property rights, if it threaten an impairment of his business.

That an individual who obtained his permit to operate a cotton gin upon showing a public necessity therefor as required by the statute, is entitled to an injunction restraining the State Commission from granting a permit to a corporation without such a showing under a separable provision of the statute violating the equal protection clause of the Fourteenth Amendment.

That a state statute regulating the business of ginning cotton for the public for profit, which permits an individual to engage in such business only upon his first showing a public necessity therefor, but allows a corporation to engage in the same business in the same locality, without such a showing, discriminates against the individual in violation of the equal protection clause; that the classification attempted in the case shown is essentially arbitrary because based upon no real or substantial differences reasonably related to the subject of the legislation.

That a co-operative ginning corporation formed under Oklahoma Compiled Statutes, 1921, Section 5637, et seq., having a capital stock, which is up to a certain amount, may be subscribed for by anyone; which is allowed to do business for others than to members, and to make profits and declare dividends not exceeding eight per cent per annum, and to apportion the remainder of its earnings among its members ratable upon the amount of production sold by them to the corporation, is not a mutual association. That a proviso added to an existing statutory provision by a subsequent legislature, and the effect of which if it were part of the original enactment would be to render the whole unconstitutional, may be treated as a separate nullity, allowing the original to stand.

That in such case one who sought and obtained property rights under the original and valid part of the statute, is not estopped from attacking the proviso."

Justices Holmes, Brandeis and Stone dissenting.

None of the cases cited in the Frost case, supra, have any more bearing or application to the case at bar than the principal case itself. The cases so cited are:

Arkansas Natural Gas Company v. Arkansas Railroad Commission, 261 U. S. 379;

Louisville Gas and Electric Company v. Coleman, 277 U. S. 32;

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389;

Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U. S. 544;

Gulf Sea and S. F. Railway Company v. Ellis, 165 U. S. 150;

Royster Guano Company v. Virginia, 253 U. S. 412;

Airway Electrical Appliance Corporation v. Day, 266 U. S. 71;

Schlesinger v. Wisconsin, 270 U. S. 230.

Appellant also cites *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, which holds in effect that:

"A law of Pennsylvania (Pa. L 1889, 420, 431; Pa. St. 1920, Section 20, 388), provides that a tax be laid on the gross receipts derived from foreign or domestic corporations from their operation of cabs in intrastate transportation of passengers, but does not tax the like receipts of individuals and partnerships in the same kind of business is in violation of the equal protection clause of Fourteenth Amendment which extends to foreign corporations within the jurisdiction of the state, and safe-guards to them the protection of the laws which are to be applied equally to all in the same situation.

That the equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, but that it does not require the classification to be not arbitrary but based on a real and substantial difference having

a reasonable relation to the subject of the particular legislation."

The cases cited in the principal case of the *Quaker City Cab Company v. Pennsylvania* are: *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U. S. 544; and *Power Manufacturing Company v. Saunders*, 274, U. S. 490.

Appellant also cites *Southern Railway Company v. Greene*, 216 U. S. 400, which holds, among other things, that:

"Equal protection of the laws means subjection to equal laws applying alike to all in the same situation. That a corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment.

That a corporation which comes into a state other than that in which it is created, pays taxes thereto and acquires property and carries on business therein, is within the jurisdiction of that state, and, under the Fourteenth Amendment, entitled to protection against any statute of that state that denies to it the equal protection of laws.

The arbitrary selection cannot be justified by calling a classification in the absence of real distinction on a substantial basis; and that a classification for taxation that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary, and a denial of the equal protection of the laws."

The appellant also cites *Royster Guano Company v. Virginia*, 253 U S. 412, which holds that:

> "A state law which taxes all the income of local corporations derived from business done outside of the state and business done within it, while entirely exempting the income derived from outside the state by local corporations which do no local business, is arbitrary and violates the equal protection clause of the Fourteenth Amendment.

The cases cited in this last mentioned principal case as authority for the holding therein are the following:

Bell's Gap Railway Company v. Pennsylvania, 134 U. S. 245;

Michigan Central Railroad Company v. Powes, 201 U. S. 245;

Keeney v. New York, 222 U. S. 525;

Citizens Telephone Company v. Fuller, 229 U. S. 322; and *Northwestern Mutual Life Insurance Company v. Wisconsin*, 247 U. S. 132.

Appellant also cites the case of *Chalker v. Railroad Company*, 249 U. S. 522, which holds that;

> "A state law making the amount of annual tax for the privilege of doing railroad construction work depend on whether the person taxed has his chief offices in the state, viz., $25.00 if he has and $100.00 if he has not—discriminate against citizens of other states in violation of Article IV, Section 2 of the Constitution.
>
> That a citizen of another state who would be

liable for the larger tax, if valid, may question its validity without first tendering the lower tax."

Cases cited by the court in the Chalker case, supra, are:

Ward v. Maryland, 12 Wall. 418;

Guy v. Baltimore, 100 U. S. 434;

Blake v. McClung, 172 U. S. 239; and *I. M. Darnell & Son Company v. Memphis*, 208 U. S. 113."

None of the decisions thus summarized have any application to or bearing upon the proposition advanced under this point in counsels' brief for the reason that our statute is easily and clearly differentiated from any of the statutes discussed or any of the holdings by the Supreme Court of the United States in any of the above mentioned cases.

Replying to the charge of discrimination presented by the argument of the counsel in their brief under Point II. I cite the following: *First National Bank v. Board of Supervisors of Harrison County*, 157 Miss. 197, 127 So. 686, where the taxing authorities adopted a system of lowering the assessment and increasing the rate of taxation for the purposes of evading the state tax levy and for other reasons, and had resulted in adopting as a system of values, or as a true value, a rate which equalled sixty-five cents on the dollar of the true value, and at this rate all assessment of all other property, except that of the banks, were made and approved by the Board of Supervisors, and that, notwithstanding its adoption with reference to everyone else, the Board required a strict construction of the law with reference to the assessment of banks, so that, in fact, the banks were required to pay at a rate of thirty-five per cent in ex-

cess of the rate of assessment required on the same valuation owned by any persons other than the banks. This court on appeal of the case by the bank, from a judgment sustaining a demurrer to its petition in which the foregoing facts, among others, were set forth, said there were two questions for decision:

> "First under Section 112 of the Constitution of the State of Mississippi, is there a requirement that all property assessed for taxes in the State of Mississippi, irrespective of its type, situation, and classification, be assessed for the purpose of taxation at its true value;
>
> "Second, if such is the requirement of said Section 112 of the Mississippi Constitution, that is, that all property shall be assessed at its true value, is it a denial of the equal protection of the law guaranteed by the Fourteenth Amendment when the property of the banks alone of all the property situated in a county is assessed at its actual or one hundred per cent value when for many years past and at that particular time of the assessment complained of, all of the property was deliberately and intentionally assessed at sixty-five percent of its value;"

The court in answer to the foregoing propounded questions held that:

> "Upon facts and pleadings practically identical with those appearing in the record of the case at bar, this Court in the case of *Magnolia Bank v. Pike County*, 111 Miss. 857, 76 So. 697, 3 A. L. R. 1365, expressly decided each of the questions now presented, and counsel for the appellant concedes

in his brief that unless the Magnolia Bank case is overruled, this case must be affirmed, and, in an effort to have us overrule that case, counsel has presented a very able and exhaustive brief and argument. The doctrine announced in the Magnolia case has been accepted and acted upon by the banks and taxing authorities of this state for more than thirteen years, and, while we have carefully considered the questions presented in the light of the authorities cited by counsel, we are unwilling to overrule the case. In all respects the case at bar is ruled by the Magnolia Bank case, and consequently the judgment of the court will be affirmed."

In *Magnolia Bank v. Board of Supervisors*, 111 Miss. 857, cited, approved and followed in the next above cited case, in which the facts are practically identical, this Court held that:

"There is no merit in the contention that a denial of the relief sought would in anywise violate the Fourteenth Amendment of the Federal Constitution, guaranteeing due process of law and equal protection of the laws. Each state has a sovereign right to classify property for purposes of assessment and taxation, and so long as property of the same class bears the same rate, or to state differently, so long as there is no discrimination between property of the same class, there is no violation of these provisions of our Federal Constitution. *Michigan Central Railroad Company v. Powers*, 201 U. S. 300, 26 Sup. Ct. 459, 50 L. Ed. 764, and authorities there mentioned. By paying the full tax for which appellant is assessed in this case, it will pay only what the Supreme

> Court of the land has exacted. It will simply be rendering 'Unto Caesar the things that are Caesar's'."

Many other cases to the like purport might be cited, but it is unnecessary to do so since the case of the *Bank v. Supervisors of Harrison County*, supra. appears to be the latest pronouncement of the law by this court.

It is true that the tax out of which the present controversy has developed is not *ad valorem* or property tax, but is an excise tax, therefore, Section 112, of the State Constitution is not directly involved. *Hattiesburg Grocery Company v. Robertson*, 126 Miss. 34; *Knox, Attorney General, v. G. M. & N. Railroad Company*, 138 Miss. 70.

Concerning the exemption of domestic corporations, as contained in sub-section 11 of the act, reference is specifically directed to the case of *Knox, Attorney General v. G. M. & N. Railroad Company*, supra, where, at page 105 of the report, this Court said:

> "The power of the state to confer exemptions from taxation of this character is settled by a long line of decisions extending from *Mississippi Mills v. Cook*, 56 Miss. 63, to *City of Jackson v. Mississippi Fire Insurance Company*, 132 Miss. 415, 95 So. 845. Moreover, if this exemption should have been void, it may be stricken from the act without affecting the remainder thereof. *Adams v. Standard Oil Company*, 97 Miss. 879, 53 So. 692.
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> * * * * * * * * * * * * * *
>
> "An income tax as hereinafter pointed out is

an excise and not a property tax.

* * * * * * * * * * * * * * *

"As to the extra territorial effect of the act, the tax imposed on residents of the state and on domestic corporations is on the whole of their income, whether derived from business within or without the state, and the contention is that the tax is void in so far as it covers income derived from business without the state. The question here presented was ruled against the appellees by the Supreme Court of the United States in *Maguire v. Trefry*, 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739, and *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445."

See also 107 *So.* 563.

It is true that subsection 11, Section 11, Chapter 132, Laws of 1924, as amended by Chapter 32, Laws Extra Sess. 1928, formed no part of the statute at the time the next above cited case was decided, but all the principles stated thereing apply with force to the statute as so amended.

It remains now only to make a careful examination of Section 11, Sub-sections 8 and 11 thereof of the statute (Chapter 32, Laws Extra Sess. 1928), after consideration of the reasoning of counsel for the appellant, as reflected in and by their brief herein. Counsel for appellant assume that under the provisions of Chapter 32, Laws Extra Sess. 1928 (Amended Section 11, Chapter 132, Laws of 1924; Section 5033, Code of 1930), the appellant under the facts stated, if he had been a domestic corporation, would have been exempted from and escaped payment of the tax by virtue of the provisions of Sub-section 11 of the statute. In

this regard, I submit that they misconceive and misapply the law. Manifestly then have reasoned thus: "Mr. Lawrence, a resident citizen of Mississippi, made contracts to construct certain parts of highways in the State of Tennessee. In the performance of those contracts he was fortunate and cleared a profit in excess of $50,000.00. This net income he, of course, brought into the State of Mississippi, either actually or by operation of the maxim that movables follow the person of the owner. The state demanded that he pay income tax on this sum." But, they insist that had Mr. Lawrence incorporated under the laws of this state, then, as a domestic corporation, no matter if he had held and owned ninety-nine per cent of the capital stock of the corporation, such corporation might and could have made the identical highway contracts in Tennessee, performed their terms, made the same profit, and, under the provision of sub-section 11 of Chapter 32, Laws Extra Sess. 1928, such income would be exempt. Therefore, they further reason, the law discriminates in favor of domestic corporations against individuals, in cases where the income is derived from identical sources and under the self-same conditions. Wherefore, the appellant contends that the statute, as it now appears in the code violates both the Federal and State Constitutions (Section 14, State, and Fourteenth Amendment to the Federal Constitutions), and ask this court to so declare it.

Now the statute provides:

> "(B) The term 'gross income' does not include the following items, which shall be exempt from taxation under this act:

"(8) Income received during the taxable year as dividends from a corporation on which such corporations has already paid, or is liable by assessment to pay, a tax pursuant to this act.

"(11) Income from a domestic corporation, when earned from sources without this state."

Let it therefore be assumed that Mr. Lawrence, before making and entering upon the performance of the contracts for the construction of the highways in Tennessee, together with an associate or associates, had applied for and received a charter of incorporation under the laws of the State of Mississippi, such corporation, a domestic corporation, by the terms of sub-section 11, would not be liable, as a corporation, for the tax on the income earned by it from sources ouside of the state. However, this income, or the net profit, earned by such a corporation from sources without the state, must naturally be divided among the share holders, free of income tax. The money thus becomes the property of individual share holders. If, then, Mr. Lawrence owned, and held, ninety-nine per cent of the capital stock of the corporation, and the profit in round numbers amounted to $50,000.00, he would be liable for the tax on $49,450 thereof, and the other holder of one per cent of the stock for the tax on $550.00. Because, sub-section 8 of the act exempts income received as dividends from a corporation only when such corporation has already paid, or is liable to pay, a tax pursuant to the provisions of the act. Now the corporation, as such, would not have paid, nor could it be liable by assessment to pay, the tax on the income pursuant to the provisions of the act. To the contrary, it is expressly exempted, as a domestic corporation, from liability to taxation

on its income earned without the state. But when the income so earned is divided amongst the share holders, then each individual share holder is, under the provisions of sub-section 8, liable for his pro rata. No tax on the whole having been paid by the corporation, the dividends do not fall within the category of those exempted by sub-section 8.

This court will not strike down a statute, or any part thereof, if it can possibly be construed as to render it constitutional. *Wheatley v. State,* 113 Miss. 555.

In *State, ex rel v. Gilmer Grocery Company,* 156 Miss. 99, the court in responding to the very proposition advanced by the appellant in the instant case by Point II of counsels' brief, said:

> "Our own court is committed to the proposition that a statute should be so construed as to render it constitutional, if possible, and a statute will not be declared invalid unless it is clearly apparent that it conflicts with the organic law after resolving all doubts in favor of its validity. See *Richard v. City Lumber Company,* 101 Miss. 678, 57 So. 977; *University of Mississippi v. Waugh* 105 Miss. 623, 62 So. 827, L. R. A. 1915 D, 588, Ann. Cas. 1916E, 522; *Miller v. State,* 130 Miss. 564, 94 So. 706.
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> "In the case of *Rast, Tax Collector, v. Van Deman,* 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455 the Supreme Court of the Land said:
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> " 'It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that it sustains it, and the

existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 61. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

* * * * * * * * * * * * * *

"'It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare'."

In *L. H. Conrad Furniture Company v. State Tax Commission*, 160 Miss. 185, 133 So. 652, this court held that:

"In construing a statute of doubtful meaning the consequences of any particular construction should be considered, whether they be good or bad. If appellant's construction of the statute here involved should be adopted, at least two harmful results would follow—namely (1), the state would probably be deprived of a considerable amount of revenues," etc.,

* * * * * * * * * * * * * *

"We are unwilling to put any such construction upon a statute, unless we are forced to do so by its unmistakable and imperative terms. We do not think this is such a statute."

In *Wheatley v. State*, 113 Miss. 555, 74 So. 427, decided by this court en banc, the Chief Justice dissenting, it is held that:

"If there are two different interpretations of

a statute, one of which would render the act constitutional, and the other unconstitutional, it is elementary that we should adopt that view and construction which would harmonize the act with the constitution, and which would therefore uphold and not strike down the work of our law makers. It is our understanding that the interpretation which we here place upon the statute is the interpretation which the Board of State Commissioners, themselves, placed upon these provisions of the statute. While the construction of the State Board would not be binding upon this court, it yet remains that the construction which a department of government has placed upon the very law under which it was created and which it is sworn to enforce should be both suggestive and persuasive with the courts."

To the same effect are the following:

Miller v. State, ex rel, Russell, 130 Miss. 564;

Hinds County v. Johnson, 133 Miss. 591;

Staple Cotton Co-operative Association v. Hemphill, 142 Miss. 298;

Robinson v. State, 143 Miss. 709;

Thompson v. Box, 147 Miss. 1, 112 So. 597;

State v. Miller, 144 Miss. 614, 109 So. 900.

(b) *In the event this court holds that the levy of an income tax earned by individuals outside of the State which is not levied on domestic corporations under the same circumstances the provision of the Constitution of the United States, then the amendment of Section* 11, *Chapter* 132.

Laws of 1924, *by Chapter* 32, *Extraordinary Session of* 1928, *must be stricken down and the original statute be permitted to stand.*

Under the provisions of Section 11, Chapter 132, Laws of 1924, the income of individuals and the income of domestic corporations were taxed exactly in the same manner. Under the provisions of the amendment as made by Chapter 32, Laws Extraordinary Session of 1928, they are taxed as heretofore set out under subdivision (a) of Point II. In the instant case, record page 22, the Supreme Court of this State holds as follows:

> "If the Chapter 32 of Laws of State of Mississippi, Extraordinary Session 1928, is constitutional, of course the appellant is subject to the tax; if such act is unconstitutional, then Section 11 of Chapter 132, Laws of 1924, would remain in force as though the amendment had not been made, and under the said chapter both individuals and domestic corporations would be subject to income tax on the income earned outside of the state as well as income earned within the state. *State v. G. M. & N. R. R. Co.*, 138 Miss. 70, 104 So. 689, and authorities therein cited. It is, therefore, unnecessary to decide whether Chapter 32, Laws (fol. 32) of Mississippi, Extraordinary Session 1928, is constitutional or not, because from either viewpoint the same conclusion and judgment would be reached—that is to say—in taking either view the appellant would be liable for the tax. See *Miller, Tax Collector, vs. C. & G. Ry. Co.*, 154 Miss., 317, 122 So., 366, at page 324 of the Mississippi Report where the court said:
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> " 'In event a railroad discriminated against

by this statute should challenge the validity thereof on the ground that it is arbitrarily discriminated against, it would not be necessary for the court to decide the question, for so to do would profit the complaining railroad nothing; for, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complainant railroad's tax would be three hundred fifty dollars per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow'.

"See also *Moore v. Tunica County*, 143 Miss. 821, 107 So. 659; *Claiborne County v. Moorehead*, 145 Miss. 867, 111 So., 372; *Buford v. State*, 146 Miss., 66, 111 So. 850; *Miller v. Tucker*, 142 Miss. 146; 105 So. 774; *Pearl River County v. Lacy Lumber Company*, 124 Miss. 85, 86 So. 755; *Adams v. Standard Oil Co. of Kt.*, 97 Miss. 879, 53 So. 602; *American Express Co. v. Beer*, 107 Miss., 528, 65 So. 575, L. R. A. 1918E 446, Ann. Cas. 1916D 127."

In the case of *Adams v. Standard Oil Company*, 97 Miss. 879, the record shows that the Legislature of this State enacted statutes levying a privilege tax upon certain trades, callings and occupations; that it exempted therefrom persons over the age of sixty-five years with an income of less than $600.00, and certain disabled and maimed persons. Confederate soldiers were also exempt from the payment of said privilege tax. The question of the constitutionality of this statute was assailed in said case, the Standard Oil Company contending that because the Confederate veterans were exempt from the payment of said privilege tax the statute was unconstitutional. However, the Court held as follows:

"Our judgment is, from a consideration of the privilege tax statutes themselves, in connection with the long-established policy of the state of raising such a large proportion of its revenues in this manner, that the unconstitutional provisions of such laws may be stricken out, and there is left a complete and consistent scheme, which the legislature would have passed alone, the terms of which include Confederate soldiers, and make them liable for the peddler's tax, along with the Standard Oil Company, and all others engaged in the business."

In the case of *Smith, Tax Collector, vs. Perkins,* 112 Miss. 870, the facts are stated as follows:

"Chapter 90 of the Laws of 1916, requires the payment of a privilege license by 'each dealer in coffins * * * in all cities, if dealer be an undertaker, one hundred dollars. If any dealer in coffins * * * is an embalmer, or employs an embalmer in connection with his business, in that event, he shall pay an additional tax of ten dollars. None of the foregoing provisions shall apply to a merchant who carries coffins in stock and pays a privilege tax on the stock. But each merchant who carries coffins in stock and pays a privilege on the stock shall pay a tax of five dollars in addition to the tax required of him as a merchant'."

The Court held as follows:

"It will be noted that appellee is a merchant and carried coffins in stock, and has paid his privilege tax as a merchant and has also paid five

dollars in addition to the tax required of him as a merchant. He refuses to pay the one hundred dollars the statute assesses against undertakers, because he contends the statute exempts merchants from paying the undertaker's privilege tax, when the merchant pays the five dollars ad-additional required of him as a merchant.

"The business of an undertaker is a distinct business or profession. The undertaker takes charge of the corpse, prepares it for burial, and attends to its interment. If a merchant dealing in coffins as part of his stock may escape the undertaker's tax, it is easy to see that all undertakers could escape by supplying themselves with an insignificant stock of goods.

"It is difficult to imagine that the legislature intended to thus favor a selected class of merchants. If this is a proper construction of the statute, we find that an undertaker with a stock of coffins worth five hundred dollars would have to pay one hundred dollars, while a merchant with a stock of coffins worth one thousand dollars would get off with his undertaker's business by the payment of five dollars.

"We are unable to attribute this sort of discrimination to the lawmakers. To make this statute a valid exercise of the legislative power a different construction must be found, if it can be reasonably done. We believe that it was the intention of the legislature to require the payment of one hundred dollars by all undertakers, without reference to whether the undertaker also sells merchandise or not.

"It is generally understood that the undertaker's business is necessarily very profitable.

The bereaved relatives of the deceased cannot haggle about prices, and the undertaker's profits are only limited by his conscience, and no sane person can imagine that an undertaker's conscience would be satisfied by the accumulation of a stock of merchandise."

In *Johnson vs. Long Furniture Company*, 113 Miss. 373, the same facts and the same statute were under consideration by the Court as in the *Smith vs. Perkins* case, supra, and the Court reaffirmed its finding in said case.

These cases were decided on the theory that if a statute attempts to accomplish two or more objects and is void as to one, it may still stand as to the other, it appearing from the policy of the state that the Legislature would probably have enacted the balance of the statute without the exemption had it known that the same was invalid.

In the case at bar the Legislature had enacted a statute (Chapter 172, Laws of 1924), which appellant concedes to be constitutional. The amendment was made by Chapter 32, Laws Extraordinary Session of 1928, and if the amendment does contravene the provision of the constitution, then the amendment will be stricken down and the original statute be permitted to stand.

The case at bar is exactly on all-fours with the case of *Buford vs. State*, 146 Miss. 66.

Section 5, Chapter 189, Laws of 1918, prohibited the sale of intoxicating liquor and fixed the punishment therefor. Section 2 of Chapter 210, Laws of 1924, amended the

statute of 1918 so as to provide additional punishment in cases of conviction. The Supreme Court in the Buford case held that the amendment was void and, therefore, the original statute was the law of the land.

I, therefore, most respectfully submit that the judgment of the Supreme Court of the State of Mississippi should be affirmed.

Respectfully submitted,

GREEK L. RICE, Attorney General,

J. A. LAUDERDALE, Assistant Attorney General

Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 580.—October Term, 1931.

S. B. Lawrence, et al., Appellants,
vs.
State Tax Commission of the State of Mississippi.

Appeal from the Supreme Court of the State of Mississippi.

[May 16, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code, from a decree of the Supreme Court of Mississippi, — Miss. —, 137 So. 503, upholding the Mississippi income tax law [c. 132, Miss. Laws of 1924, as amended in 1928, c. 124, 2 Miss. Code Ann. (1930) 2136], which, as applied to appellant, is assailed as infringing the Fourteenth Amendment of the Federal Constitution. Sections 5027 and 5033 of the statute impose an annual tax on the net income of corporations and individuals. But paragraph (b) of § 5033, added by the Act of 1928, provides: "The term gross income does not include . . . (11) Income of a domestic corporation, when earned from sources without this state. . . . ."

Appellant, a citizen and resident of Mississippi, brought the present suit to set aside the assessment of a tax upon so much of his net income for 1929 as arose from the construction by him of public highways in the State of Tennessee. The taxing statute was challenged on the ground that in so far as it imposes a tax on income derived wholly from activities carried on outside the state, it deprived appellant of property without due process of law, and that in exempting corporations, which were his competitors, from a tax on income derived from like activities carried on outside the state, it denied to him the equal protection of the laws.

The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to dis-

tribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Maguire* v. *Trefry,* 253 U. S. 12, 14, 17; *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498; *Shaffer* v. *Carter,* 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. *Kirtland* v. *Hotchkiss, supra.*

Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state, *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Frick* v. *Pennsylvania,* 268 U. S. 473, 488-489; but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there. See *Foreign Held Bond Case,* 15 Wall. 300, 319; *Frick* v. *Pennsylvania, supra,* p. 494. And the taxation of both by the state of the domicile has been uniformly upheld. *Kirtland* v. *Hotchkiss, supra; Fidelity & Columbia Trust Co.* v. *Louisville, supra; Blodgett* v. *Silberman,* 277 U. S. 1; *Maguire* v. *Trefry, supra; compare Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *First National Bank of Boston* v. *Maine,* 284 U. S. 312.

The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, *Hattiesburg Grocery Co.* v. *Robertson,* 126 Miss. 34; *Knox* v. *Gulf, M. & N. R. Co.,* 138 Miss. 70, but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it. See *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387; *Pacific Co.,*

Ltd. v. *Johnson*, — U. S. —, decided April 11, 1932; *Shaffer* v. *Carter, supra*, pp. 54-55.

It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, see *Fidelity & Columbia Trust Co.* v. *Louisville, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra,* still, it could not tax the receipt of income upon payment of that same obligation. We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state. *Maguire* v. *Trefry, supra;* see *Fidelity & Columbia Trust Co.* v. *Louisville, supra.*

The Supreme Court of Mississippi found it unnecessary to pass upon the validity of so much of the statute, added by the amendment of 1928, as exempted domestic corporations from the tax on income derived from activities outside the state. It said that if the amendment were valid, appellant could not complain; if invalid, he would still be subject to the tax, since the act which it amended, §11, c. 132, Laws of 1924, would then remain in full force, and under it individuals and domestic corporations are taxed alike. *Knox* v. *Gulf, M. & N. R. Co., supra.*

But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed con-

stitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. See *Ward* v. *Love County*, 253 U. S. 17, 22; *Enterprise Irrigation District* v. *Canal Company*, 243 U. S. 157, 164; *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655. Upon one of the alternative assumptions made by the court, that the amendment is discriminatory, appellant's constitutional rights were infringed when the tax was levied upon him, and state officers acting under the amendment refrained from assessing the like tax upon his corporate competitors. See *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 246. If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, see *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508, 512 *et seq.*; *Smith* v. *Cahoon*, 283 U. S. 553, 564, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. The burden does not rest on him to test again the validity of the amendment by some procedure to compel his competitors to pay the tax under the earlier statute. *Iowa-Des Moines National Bank* v. *Bennett, supra*, p. 247. See *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23. We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question.

The statute relieves domestic corporations from the tax only in so far as their income is derived from activities carried on outside the state. The appellant is thus compelled to pay a tax from which his competitors, if domestic corporations, are relieved, and this, it is urged, is so plainly arbitrary as to infringe the equal protection clause.

But, as there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates, acceptance of this contention would relieve the appellant from the

burden which rests on him to overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts, and would require us to assume that there is no state of facts reasonably to be conceived which could afford a rational basis for distinguishing, for taxation purposes, between income of individuals and that of domestic corporations, derived from business carried on without the state. *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78-79; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258.

What the local conditions are in Mississippi and its neighboring states with respect to businesses like the present, carried on across state lines by individuals and corporations, does not appear. How the statutory provisions now in question are related to others by which a permissible divergence in state policy with respect to the taxation of corporations and of individuals may be effected, is not shown. See *General American Tank Car Corp.* v. *Day*, 270 U. S. 367, 373; *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245, 251; *Farmers and Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, 529 *et seq.* We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment, demonstrates that there may be.

Apart from other considerations which may have led to the present legislation as an integral part of the state system of taxation of the income of corporations, one which affords a rational basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both. See §§ 5033 (a), 5033 (b) (11), 5033 (b) (8). In the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed, and not the corporation. That was held in *Franklin* v. *Carter*, 51 F. (2d) 345, to be a sufficient ground for upholding a statute of Oklahoma, assailed as denying

the equal protection of the laws, which had substantially the same features as the present statute. See also *Conner* v. *The State*, 82 N. H. 126, 132. The question presented thus differs from any raised in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, and *Royster Guano Co.* v. *Virginia*, 253 U. S. 412. Compare *White River Lumber Co.* v. *Arkansas*, 279 U. S. 692.

The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions. *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 573; *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527, 537.

Affirmed.

Mr. Justice VAN DEVANTER dissents from so much of the opinion as concerns the equal protection clause of the Fourteenth Amendment.

A true copy.

Test:

Clerk, Supreme Court, U. S.